



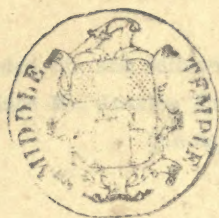
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OF THE

LAWS OF CEYLON



JAMES CECIL WARDEN PERERA


OF THE MIDDLE TEMPLE, BARRISTER AT LAW, AND
OF THE SOUTHERN CIRCULAR, BARRISTER AT LAW, AND
OF THE SOUTHERN CIRCULAR, BARRISTER AT LAW, AND

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INSTITUTES

OF THE

LAWS OF CEYLON,

Founded on, and following the arrangement of, the
late Mr. Justice Thomson's work bearing
the same title,

BY

JAMES CECIL WALTER PEREIRA,

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TO
THE HON. CHARLES PETER LAYARD,
HIS MAJESTY'S ATTORNEY-GENERAL FOR
THE ISLAND OF CEYLON,
IN ACKNOWLEDGMENT OF KIND ENCOURAGEMENT, THIS WORK IS,
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PREFACE.

BOUT the beginning of the year 1899 the work of editing—revised, enlarged, and brought up to date—the “Institutes of the Laws of Ceylon,” by the late Mr. Justice Thomson, was placed in my hands by Government. Thomson’s work was published some thirty-eight years ago, and at the very outset I found that although it was admirably adapted to serve for a series of years the purpose for which it was intended, it fell so far short of the present developments of our law that it could not be merely added to, but had to be reconstructed, weaving into the new material so much only of the old as could still bear use. In this process what has been aimed at has been the embodiment of our law in a convenient, collected, and accessible shape, bringing into prominence its principles and the substance of the rulings of Courts, with clear indications of the authorities relied on, to be resorted to, when necessary, for deeper insight. The unavoidable result of this reconstruction has been, so far at least as this first volume is concerned, that, except that so much of Thomson’s work as still has life has here been repeated, the volume itself is “Thomson” in nought but its groundwork and the general arrangement of its subjects.

The first volume of “Thomson” is in eighteen chapters. Chapter III. treats of such subjects as Crown Lands; the

Grain Tax ; Arrack, Rum, and Toddy ; Tolls ; Timber, &c. This chapter covers no less than one hundred and seventeen pages of the work, and is little else than a repetition *verbatim* of the several local legislative enactments, since repealed, on these subjects. Now, while thirty-eight years ago it was perhaps necessary to bring into prominence by inserting in a legal text-book legislative enactments on various subjects, such enactments are now so easily accessible, and printed in a form so convenient for reference, that their insertion here could only have served to swell this volume to an undesirable size. I have therefore omitted from this volume that chapter, adding to it, however, as an appendix, a short reference to the enactments dealing with the chief of the different sources of the "Royal Revenue" in this Island, allotting to the subject of Crown lands more space than to the rest, as its importance as a subject of legal speculation seemed to me to justify more liberal treatment.

Chapters V. to XVIII. of "Thomson" comprise under as many headings what corresponded to the different subjects now dealt with in the Courts Ordinance and the Civil Procedure Code. The repetition in a work like this of effete procedure would have been worse than useless. Our "Civil Practice" of old, based partly on the methods of Dutch Tribunals, had no connection with the sources of the modern Civil Procedure of our Courts, which we have borrowed mainly from India ; and a consideration of the old rules of practice side by side with the new would only plunge us deeper into such confusion and doubt as often result from an attempt to interpret the phraseology used in giving expression to some of the latter. I have therefore been obliged to omit from this volume the contents of chapters V. to XVIII. of Thomson's work. Their place had, however, to be supplied, and the inevitable method of doing this was the insertion here of the Courts Ordinance and the

Civil Procedure Code. I have done this with as full annotation and citation of authoritative decisions of Courts as the compass of a volume like this would permit, and in the case of the Civil Procedure Code I have inserted references to provisions, corresponding to its different sections, of the Indian Code of Civil Procedure and the English Judicature Acts, and some of the rulings of Indian and English Courts on the construction and application of these provisions. As to Indian cases, I have to acknowledge my indebtedness to Mr. Justice O'Kinealy's *Commentary on the Indian Code*. The edition that I had for reference was that of 1893, and the rulings since that year I have culled from various Law Reports of India and their Digests, and from as many other sources as were available in Ceylon. In the matter of English and Indian decisions, however, I have endeavoured not to overburden this work with cases not strictly applicable to Ceylon, and I have been at some pains to make a selection of such only as seemed to be likely to be of practical use here. Summaries of all local decisions bearing on the different subjects dealt with in this volume up to, at any rate, the time of my placing the manuscript in the hands of the printer, that is, about the middle of the year 1899, will be found inserted in these pages.

The groundwork of the chapter on "Prerogative" is borrowed from Sir William Blackstone's *Commentaries on the Laws of England*. A series of articles by Mr. Harry Creasy in the *Ceylon Legal Miscellany* were also of use to me in writing that chapter; and I must acknowledge to have received great help from the work of Mr. Tarring, Assistant Judge of the British Consular Court, Constantinople, on the law relating to the Colonies, in marshalling the case law on some of the subjects treated on in the chapter on "The Colonial Government and the Public Service."

To the Hon. Sir WINFIELD BONSER, Kt., Chief Justice, I respectfully acknowledge my indebtedness for valuable suggestions and references to several reported decisions of English Courts in the earlier part of this work, which had eluded my research.

This volume, I have no reason to believe, is free from imperfections—indeed, they may be numerous, but I venture to think that such as there are will be found to be chiefly of the nature of those that usually appear in initial editions of works of this nature.

WALTER PEREIRA.

Colombo, August 31, 1901.

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ERRATA.

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- Page 6, line 2 from top, delete "the Executive."
Page 9, line 9 from top, for "their" read "the."
Page 22, line 18 from top, insert "1" before "Moore."
Page 25, line 9 from bottom, for "emanate" read "emanates."
Page 31, line 6 from bottom, for "*hereditem*" read "*hereditatem*."
Page 32, line 12 from top, delete comma after "*representat*."
Page 32, line 19 from top, for "*principen*" read "*Principem*."
Page 32, line 12 from bottom, read "His Lordship was of opinion"
for "In this case the Supreme Court held."
Page 36, lines 1 and 2 from top, read "tortious" for "tortuous."
Page 197, line 6 from top, read "most" for "those."
Page 222, line 17 from top, read "1 N. L. R." for "2 N. L. R."
Page 316, line 13 from top, for "O. R. 45" read "O. 65, R. 1."
Page 513, line 8 from bottom, read "Diplock" for "Heplock" and
"G." for "E."

ABBREVIATIONS EXPLAINED.

- A. & E.—Adolphus & Ellis. Q. B.
 A. C. { —Law Reports, Appeal Cases [1876–1890].
 App. Cas. { —Law Reports, Appeal Cases [1891 onwards].
 1891 (A. C.). —Law Reports, Appeal Cases [1891 onwards].
 Agra.—Reports of the High Court of Judicature for the North-
 Western Provinces, by M. H. and L. L. Pershad, vols. I.–IV.,
 Agra.
 Agra, F. B.—Reports, &c., containing Full Bench Rulings, Agra.
 Austin.—Austin's Reports [Ceylon].
 Bac. Ab.—Bacon's Abridgment.
 B. & Ad.—Barnewall & Adolphus. K. B.
 B. & Ald.—Barnewall & Alderson. K. B.
 B. & C. { Barnewall & Cresswell. K. B.
 Barn. & C. {
 Beav.—Beavan. Rolls Court.
 Bing. N. C.—Bingham. New Cases.
 Bl. { Blackstone's Commentaries on the Laws of England,
 Bl. Com. { edited by Joseph Chitty.
 Blackst. by Harg.—Blackstone's Commentaries on the Laws of
 England, edited by Hargreaves.
 B. L. R.—Bengal Law Reports.
 B. L. R. A. C.—Bengal Law Reports, Appeal Cases.
 B. L. R. (F. B.).—Full Bench Rulings of the High Court at Fort
 William, Calcutta, 1874.
 B. H. C.—Reports of Cases decided in the High Court of Bombay,
 1867–1875.
 B. N. C.—Brook's New Cases. K. B.
 Bom.—Bombay High Court Reports, 1862–75.
 Bouln.—Reports of Cases in the Supreme Court at Fort William,
 by C. Boulnois.
 Bourke.—Reports of Cases in the High Court of Judicature at Fort
 William, by W. M. Bourke.
 Br. & Lush.—Browning & Lushington. Admiralty.
 Br. Com.—Broom's Commentaries.
 Br. { Browne's Reports [Ceylon].
 Br. Rep. {
 Burn.—Burn's Justice of the Peace.
 Burr.—Burrows. K. B.
 Cal. L. R.—Calcutta Law Reports, 1877–84.
 Campb.—Campbell's Reports. Nisi Prius.
 C. & P.—Carrington & Payne. N. P.
 Car.—Carter's Reports. C. P.
 C. B.—Common Bench Reports.
 C. B. N. S.—Do. New Series.
 C. D.—Law Reports, Chancery (1876–1890).
 Ch.—Chitty on Prerogative.
 Chal. {
 Chalmer's { Chalmer's Opinions of Eminent Lawyers.
 Col. of Op. {
 Clark's Col. Law.—Clark's Summary of Colonial Law.
 C. L. R.—Ceylon Law Reports.
 C. O. L.—Colonial Office List for 1898.
 Com. ad Pand.—Voet's Commentaries on the Pandects.
 Coryton.—Coryton's Reports, High Court, Calcutta, 1862–63.

Cowp.—Cowper's Reports. K. B.

C. P. D.—Law Reports, Common Pleas Division [1875–1880].

Creasy.—Creasy's Reports [Ceylon].

Dowl. N. S.—Dowling's Practice Cases. Q. B.

Drew. & Sm.—Drewry & Smale. Ch.

East.—East. K. B.

Ev. Ord.—The Ceylon Evidence Ordinance, 1895 [No. 14 of 1895].

Ex. D.—Law Reports. Ex. Div. (1875–1880).

F. & F.—Foster & Finlason. Nisi Prins.

ff.—A symbol of doubtful origin indicating a title of the Pandects or Digest.

l (lex) is a term applied to the separate extracts in the Digest.

h. t. (*hujus tituli*) of this title, *i.e.*, title under which a *law* of the Digest is cited in a Commentary.

Fulton.—Reports of Cases in the Supreme Court of Judicature at Fort William, Calcutta, by J. W. Fulton, 1845.

Gren.

Gren. Rep. } Grenier's Reports [Ceylon].

Giff.—Giffard's Reports, Chancery.

Hagg. Con. Rep.—Haggard's Consistory Reports.

Hare.—Hare's Reports. Ch.

Hyde.—Hyde's Reports. High Court, Calcutta, 1863–64.

I. L. R. All.—Indian Law Reports, Allahabad Series.

I. L. R. Bom.—Do. Bombay Series.

I. L. R. Cal.—Do. Calcutta Series.

I. L. R. Mad.—Do. Madras Series.

Ind. Jur. N. S.—The Indian Jurist, New Series.

Ir. C. L. R.—Irish Common Law Reports (1850–1866).

Jos. & Bev.—Reports by Joseph and Beven [Ceylon].

Knapp.—Knapp's Reports. Privy Council.

Let. Pat.—Letters Patent.

Lor. Rep.—Lorenz's Reports [Ceylon].

L. J. Adm.—Law Journal Reports, Admiralty.

L. J. Ch.—Do. Chancery.

L. J. C. P.—Do. Common Pleas.

L. J. Ecc.—Do. Ecclesiastical.

L. J. Ex.—Do. Exchequer.

L. J. P.—Do. Probate, Divorce, and Admiralty.

L. J. P. & M.—Do. Probate and Matrimonial.

L. J. P. C.—Do. Privy Council.

L. J. Q. B.—Do. Queen's Bench.

L. R. A. & E. }

L. R. Ch. }

L. R. C. P. }

L. R. Eq. }

L. R. Ex. }

L. R. H. L. }

L. R. P. & M. }

L. R. P. C. }

L. R. Q. B. }

L. R. I. A. }

L. R. Ind. App. } Law Reports. Indian Appeals. Privy Council.

L. T. Rep.—Law Times Reports.

Macph. Pr. Com. Prac.—Macpherson's Practice of the Judicial Committee of the Privy Council.

Mad. H. C.—Reports of Cases decided in the High Court of Madras, 1862–75.

M. & G.—Manning & Granger. C. P.

M. & S.—Maule & Selwyn. K. B.

- Marsh. Judg.—Marshall's Judgments [Ceylon].
 Mer.—Merivale. Ch.
 Moore.—Moore. C. P.
 Moo. Ind. App.—Moore. Indian Appeal Cases. Privy Council.
 Moo. P. C. C. { Moore's Privy Council Cases.
 Moo. P. C. R. {
 Moo. P. C. C. N. S.— Do. New Series.
 Morg. Dig.—Morgan's Digest [Ceylon].
 My. & C. { Mylne and Craig. Ch.
 My. & Cr. {
 N. L. R.—New Law Reports [Ceylon].
 N.-W. P.—Reports of Cases of the High Court, North-Western
 Provinces, Allahabad, 1873-75.
 O. K. { Justice O'Kinealy's Commentary on the Indian
 O. Kin. Com. { Code of Civil Procedure.
 P. Will.—Peere Williams. Ch.
 Q. B.—Queen's Bench Reports (1841-1852).
 Q. B. D.—Law Reports, Queen's Bench Division (1876-1900).
 1891 (Q. B.).—Law Reports, Queen's Bench (1891 onwards).
 Ram.—Ramanathan's Reports [Ceylon].
 R. & R.—Revised Rules and Regulations for Her Majesty's
 Colonial Service as published in the Colonial Office List for
 1898.
 O. R.—An Order and Rule under the Judicature Acts.
 Robert.—Robertson's Appeal Cases.
 Roy. Instr.—Royal Instructions.
 S. & S.—Simon's and Stuart's Reports. Ch.
 Salk.—Salkeld. K. B.
 Sc.—Scott's Reports. C. P.
 S. C. C.—Supreme Court Circular [Ceylon].
 S. C. R.—Supreme Court Reports [Ceylon].
 Sim.—Simons. Ch.
 Sm. & G.—Smale & Giffard. Ch.
 St. Tr. { State Trials.
 St. Tr. Col. {
 Suth.—The Weekly Reporter, Appellate High Court, by D. Suther-
 land, Calcutta.
 Suth. R.—Sutherland's Reports of Decisions of the Appellate High
 Court from January to July, 1864.
 Swa.—Swabey. Adm.
 Tamb. Rep.—Tambiah's Reports [Ceylon].
 T. & R.—Turner & Russel's Reports. Ch.
 Term. Rep. { Term Reports. Durnford & East. K. B.
 T. R. {
 Throop.—Throop's Edition of the New York Code.
 Vand. Rep.—Vanderstraaten's Reports [Ceylon].
 Voet ad Pand.—Voet's Commentaries on the Pandects.
 Ves.—Vesey Sen. Ch.
 Vin. Ab.—Viner's Abridgment.
 Wendt.—Wendt's Reports [Ceylon].
 Wh. Law. Lex.—Wharton's Law Lexicon.
 W. N.—Weekly Notes from 1865.
 W. R.—Weekly Reporter [Indian], Appellate High Court, by D.
 Sutherland, Calcutta.
 W. R. (F. B.).—Special Number of Sutherland's Weekly Reporter
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INSTITUTES OF THE LAWS OF CEYLON.

VOLUME I.

CHAPTER I.

INTRODUCTORY.

CEYLON is a Crown Colony* acquired partly by conquest and partly by cession. The Maritime Provinces were capitulated on the 15th February, 1796, and by operation of the doctrine that in conquered countries the laws remain until they are altered by the conqueror [*Campbell v. Hall*, 20 St. Tr. Col. 323 ; *Blankard v. Galdy*, 2 Salk. 411 ; *R. v. Vaughan*, 4 Burr. 2500 ; *Ruding v. Smith*, 2 Hagg. Consist. Rep. 382] the laws of the ancient Government of the United Provinces continued to be in force. The reason for this doctrine may be gathered from the judgment in *Freeman v. Fairlie* [1 Moo. Ind. App. 324] to be that, inasmuch as in countries with civil institutions there is an established *lex loci* which it might be highly inconvenient all at once to abrogate, and there are new subjects to be governed, ignorant of the laws of the country of the acquirer, and unprepared perhaps in civil and political character to receive them, the *lex loci* remains until changed by the deliberative wisdom of the new

Ceylon, a
Crown
Colony.

The laws in
force after the
capitulation
of the
Maritime
Provinces.

* See Chapter III.

Laws
contrary to
the principles
of the British
Constitution.

Extent of the
operation of
the old laws.

Aliens in
British
colonies.

The Roman-
Dutch Law.

Legislation
in Holland
since the
capitulation.

Power of
Sovereign to
make new
laws for a

legislative power. It must, however, be remembered that in countries conquered by England, laws contrary to the fundamental principles of the British Constitution cease at the moment of conquest [Cp. Lord Ellenborough, 30 St. Tr. Col. 742]; and accordingly torture cannot be inflicted by English authority in a conquered colony [*Fabrigas v. Mostyn*, 20 St. Tr. Col. 181]. Subject to this exception, the old law equally affects all persons and all property within the limits of the country, and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privileges distinct from the natives [*per* Lord Mansfield in *Campbell v. Hall*, 29 St. Tr. Col. 323]. Every alien coming into a British colony becomes temporarily a subject of the Crown, bound by, subject to, and entitled to the benefit of, the laws which affect all British subjects. He has obligations and rights both within and beyond the colony into which he comes. As to his rights within the colony he may well be bound by its laws; but as to his rights beyond the colony he cannot be affected by those laws, for the laws of a colony cannot extend beyond its territorial limits [*Low v. Routledge*, L. R. I. Ch. App. 47].

A system of laws which continued to be in force, in the Maritime Provinces, since the capitulation is, as shown below, what is now known as the Roman-Dutch Law; but as to this law it must be noted that legislation in Holland since the capitulation could not be taken as having extended to Ceylon [see 2 P. Will. 75; *Catterall v. Catterall*, 1 Robert, 581; *The Lauderdale Peerage*, L. R. 10 App. 744].

The power of the Sovereign to make new laws for a conquered country has often been asserted by the courts. In a conquered country, the conqueror, by

saving the lives of the people conquered, gains a right and property in such people, in consequence of which he may impose upon them what laws he pleases [2 P. Will. 75; cf. *A.-G. v. Stewart*, 3 Mer. 157]. In *Smith v. Brown* [2 Salk. 666] Lord Holt said that the laws of England did not extend to Virginia. Being a conquered country her law was what the king pleased. So in *Beaumont v. Barrett* [1 Moo. P. C. C. 75] it was laid down that Jamaica was a conquered island and, as in other territory obtained by conquest, such laws were in force there as the king by his supreme authority might choose to direct. The king has the whole legislative power in a conquered colony, in so far as he may not have parted with it by capitulation or by his own voluntary grant [*Cameron v. Kyte*, 3 Knapp 346]; and the power of the Crown to make law may be exercised not only by Order in Council, but by Charter of Justice under the Great Seal [*Jephson v. Reira*, 3 Knapp, 130]. The king, however, can make no laws which are contrary to fundamental principles, or which create exemptions from the laws of trade, or the authority of Parliament, or give privileges exclusive of his other subjects [20 St. Tr. Col. 323. But see The Colonial Laws Validity Act, 1865—28 & 29 Vict.c.63—section 3]. In exercise of this power of the Sovereign to make laws His Majesty, King George III., commanded, as published and declared in the Proclamation of the 23rd September, 1799, that the administration of justice and police in the settlements of the Island then in His Majesty's dominion and in the territories and dependencies thereof should be thenceforth and during His Majesty's pleasure exercised by all courts of judicature, civil and criminal, magistrates and ministerial officers, according to the laws and institutions that subsisted under the ancient Government of the United Provinces, subject to such deviations and alterations as the Governor should by the said

conquered
country.

How to be
exercised.

Proclamation
of 23rd
September.
1799.

Proclamation or by any future Proclamation, and in pursuance of the authorities confided to him, deem it proper and beneficial for the purposes of justice to ordain and publish, or which should or might thereafter be by lawful authority ordained and published. So that, since that Proclamation, the laws that subsisted under the ancient Government of the United Provinces began to be administered in the Maritime Provinces of Ceylon as laws made and promulgated by the Crown.

The Kandyan territory.
Convention of 2nd March, 1815.

The Kandyan territory was ceded to England by the Convention of the 2nd March, 1815, and by it was saved to all classes of the people the safety of their persons and property with their civil rights and immunities, according to the laws, institutions, and customs established and in force amongst them. In ceded colonies the Sovereign's legislative power is the same as in conquered colonies, except that if the treaty of cession regulate the right of legislation, the terms ought to be obeyed [*In re Adam*, 1 Moo. P. C. C. 470].

The different systems of law in Ceylon.

Thus in Ceylon no less than five systems or portions of systems of Municipal Common Law were given the Royal sanction. These were the Roman-Dutch Law; the Thesawalamai, or customs of the Malabar inhabitants of the "Province of Jaffna;" the laws and usages of the Mussulmans; the "Mukkuva Law," or the custom regulating the succession to intestate property of the Mukkuvars of Batticaloa; and the Kandyan Law.

Laws peculiar to the Sinhalese population of the Maritime Provinces. Section 32 of Charter of 1801.

The question remains whether the Sinhalese population of the Maritime Provinces had not certain laws and usages peculiar to themselves, and if they had, whether those laws and usages also were not conserved. This question suggests itself in consequence of a provision in the Charter of 1801. Section 32 of that Charter provided that "in the case of Cingalese natives, their inheritance and succession to lands, rents, goods, and all matters of contract and dealing between

party and party should be determined by the laws and usages of the Cingalese." The possession of the Island by the Dutch was as a mere military tenure,* and it is possible that the Dutch Law applied only to the Dutch and a very limited portion of the Sinhalese population — to the Sinhalese who were part of the urban population in the centres of the Dutch possessions—and that the bulk of the Sinhalese had their own special customs and customary law. It is now too late in the day to hope for any advantage by the discussion of this question, as, subject to the limited operation of the special native laws already referred to, the Roman-Dutch Law has long since been considered and acted upon as the law of the land.

The Proclamation of the 23rd September, 1799, was repealed by Ordinance No. 5 of 1835, except the portion cited above referring to the laws and institutions that subsisted under the "ancient Government of the United Provinces." The words containing the exception are as follow: "except in so far as the same doth publish and declare that the administration of Justice and Police within the Settlements then under the British dominion, and known by the designation of the Maritime Provinces, should be exercised by all courts of judicature, civil and criminal, according to the laws and institutions that subsisted under the ancient Government of the United Provinces, which laws and institutions, it is hereby declared, still are and shall henceforth continue to be binding and administered through the Maritime Provinces and their dependencies, subject, nevertheless, to such deviations and alterations as have been, or shall hereafter be by lawful authority ordained * * *"

Repeal of
Proclamation
of 23rd
September,
1799.

The legislative authority of the Crown in Ceylon was once delegated to the Governor alone, then to the

Legislative
authority of
the Crown in
Ceylon.

* Tennent.

Charters of
Justice.

Governor and a Council, and now it is in the Governor, the Executive, and the Legislative Council. The Crown has legislated in a direct manner by Charters of Justice. The first of these was dated the 18th April 1801. By it, under the Great Seal, courts of justice were established, and their proceedings directed. By section 96 the Crown reserved to itself the power to make such further or other provision at its will and pleasure, and as circumstances might require for the administration of justice throughout the settlements, territories, and dependencies then in its possession.

Charter of
1810.

This Charter was altered in certain respects by a Charter of the 6th August, 1810, whereby further provisions were made for the more speedy and due administration of justice in the settlements, territories, and dependencies aforesaid. The power to alter this Charter also and make further or other provision for the purpose aforesaid was reserved to the Crown by section

Charter of
1811.

19. With a like reservation, by a Charter of the 30th October, 1811, the Charter of 1810 was altered and further provisions made touching the matters contained therein ; and lastly, by a Charter of the 18th February, 1833, containing a similar provision to that in the antecedent ones as to alteration and addition, all the prior Charters mentioned above were repealed and “ more general and more effectual ” provision was made

Charter of
1833.

for the administration of justice throughout the whole Island. By Letters Patent of the 28th January, 1843, power was given to the Governor or to the Officer for the time being administering the Government of Ceylon, by any laws or ordinances to be by him made from time to time with the advice and consent of the Legislative Council, to alter and amend the provisions of the Charter of 1833 touching the constitution and jurisdiction of the courts and the procedure therein, provided that no law or ordinance relating to or affecting the administration of justice should take

Power to
amend
Charter.

effect until the same should have been ratified and confirmed by the Crown, unless the same should have been passed by the unanimous votes of the Legislative Council; and all the Judges for the time being of the Supreme Court should have certified under their respective hands to the Governor or Officer for the time being administering the Government their unanimous opinion that it would be expedient that such law or ordinance should take immediate effect and should not be suspended for the signification of the pleasure of the Crown. This proviso was expunged by Letters Patent of the 2nd July, 1844, and doubts removed as to the power of the local Legislature to abrogate or annul all or any of the provisions of the Charter of 1833. Since then Ordinances have been passed amending and, ultimately, repealing* altogether this Charter, and the laws sanctioned as shown above by Royal authority have been added to by the introduction into this Island, in some respects, of the laws of England.

By Ordinance No. 3 of 1846, the Law of Evidence of England was, with certain exceptions and subject to certain special provisions, made the Law of Evidence of this Colony. This Ordinance was repealed by "The Ceylon Evidence Ordinance, 1895," but it was therein provided [section 100] that whenever in a judicial proceeding a question of evidence should arise not provided for by that Ordinance or by any other law in force in this Island, such question should be determined in accordance with the English Law of Evidence for the time being. Then, by Ordinance No. 22 of 1866 was introduced into this Colony the Law of England with respect to Partnerships, Joint Stock Companies, Corporations, Banks and Banking, Principals and Agents, Carriers by Land, and Life and Fire

Introduction
of English
Law.

* Repealed by Ordinance No. 11 of 1868, save and except such portions as were specially

reserved and set out in that Ordinance. For those portions see sections 11, 12, 52, and 53.

Insurance ; and by Ordinance No. 5 of 1852 the English Law relating to all Maritime matters and to Bills of Exchange, Promissory Notes, and Cheques. By section 58 of Ordinance No. 7 of 1853, fraudulent preferences according to the Law of England are to be deemed such in like cases within this Colony ; and by subsection 2 of section 58 of Ordinance No. 11 of 1896 the rules of the English Law, including the Law Merchant, save in so far as they are inconsistent with the express provisions of this Ordinance, and in particular the rules relating to the Law of Principal and Agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, are to apply to contracts for the sale of goods.

Law and practice as to administration of estates of deceased persons.

Then, the practice with regard to the administration of estates of deceased persons obtaining in Ceylon was mainly founded upon the practice and regulations of the Ecclesiastical Courts in England, but it was not restricted to the mode of procedure adopted in those courts, much of the Ceylon system being analogous to the procedure in the English Equity Courts [*In re Idroos Lebbe Markar*, Ram. for 72-76, p. 102]. The law itself as to the powers and duties of executors and administrators in force in Ceylon is the English Law, with the addition that the powers and duties extend to real as well as personal property [D. C., Galle, 28,256, Vand. 273]. The law and jurisdiction of the courts in these respects were originally introduced by Charter.

Position of an executor in Ceylon.

An executor in Ceylon is a different person from the executor under the Roman-Dutch Law, who had no more powers than the will gave him, and did not represent the testator. An executor or administrator in Ceylon does represent the deceased for purposes of administration and has the status and powers of a legal representative, and by probate or letters an estate commensurate with those powers sufficient for administration and limited thereto passes to him. No assent

of the executor or administrator is necessary to pass title to the heirs appointed by the will or the heirs-at-law, for they have this title on the death of the testator or intestate, subject to the suspension of enjoyment during administration and subject to the limited estate or title of the executor or administrator. The executor's or administrator's duties concluded, his powers and estate disappear, and what remains after liquidation is left free for enjoyment by their heirs [*per* Withers, J., in *Mohomado v. Cassim*, 2 C. L. R. 72].

The question whether a judge is personally interested in a case so as to disqualify him from trying it is to be decided by the principles of the Law of England applicable to the same question in England [Courts Ordinance, section 90]; and as regards matters of criminal procedure for which no special provision has been made by the Criminal Procedure Code or by any other law for the time being in force in the Island, the law relating to criminal procedure for the time being in force in England is to be applied, so far as the same is not inconsistent with the Code and can be made auxiliary thereto [Criminal Procedure Code, section 6].

When any part of an English statute relating to these matters has been authoritatively construed by the Court of Appeal in England, such construction ought to be adopted by the courts of this Colony [*Trimble v. Hill*, L. R. 5, App. 344].

Decisions of
Courts of
Appeal in
England.

It was laid down [*per* Dr. Lushington] in *Catterall v. Sweetman* [1 Robert 318] that Acts of Colonial Legislatures where the English Law prevails must be governed by the same rules of construction as prevail in England, and English authorities upon Acts *in pari materia* are authorities for the interpretation of Colonial Acts [see *Meideen v. Banda*, 1 N. L. R. 51].

Rules of
construction
of Acts of
Colonial
Legislatures.

In addition to the sources of local law noticed above, Ceylon, like every other colony, is subject to the

Legislative
authority of
Parliament.

paramount legislative authority of Parliament [Clark's Col. Law 10; Blackst. by Harg. 108]. "A country conquered by the British arms," says Lord Mansfield in *Campbell v. Hall* [20 St. Tr. Col. 322], "becomes a dominion of the king in right of his Crown, and therefore necessarily subject to the legislative power of the Parliament of Great Britain." The Act to remove doubts as to the validity of Colonial Laws [28 and 29 Vict. c. 63] enacts [section 2] that "any Colonial Law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the Colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain void and inoperative."

Section 3, however, of the Act provides that no Colonial Law shall be, or be deemed to have been, void or inoperative on the ground of repugnancy to the Law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid. This repeals the vague limitation formerly supposed to exist, that laws made for a Crown Colony must not be repugnant to the Common Law of England [see Sir F. Stephen's History of the Criminal Law of England, II., 58].

Foreign
Jurisdiction
Act, 1890.

In exercise of the power of Parliament to make laws for the colonies, Her Majesty is empowered by the Foreign Jurisdiction Act, 1890 [53 and 54 Vict. c. 37, section 5], to direct by Order in Council that all or any of the enactments mentioned below,* or any enactments

* 12 and 13 Vict. c. 96 (Admiralty Offences, Colonial); 14 and 15 Vict. c. 99 (Evidence), ss. 7, 11; 17 and 18 Vict. c. 104 (Merchant Shipping), part X.; 19 and 20

Vict. c. 115 (Foreign Tribunals Evidence); 22 Vict. c. 20 (Evidence by Commission); 22 and 23 Vict. c. 63 (British Law Ascertainment); 23 and 24 Vict.

for the time being in force amending or substituted for the same, shall extend, with or without any exceptions, adaptations, or modifications, in the Order mentioned, to any foreign country in which for the time being Her Majesty has jurisdiction; and thereupon those enactments shall, to the extent of that jurisdiction, operate as if that country were a British possession, and as if Her Majesty in Council were the Legislature of that possession.

It may here be mentioned that the Law of Ceylon upon any particular point must be proved as a matter of fact in the courts in England [see *Astley v. Fisher*, 6 C. B. 572; and *In re Gillespie*, L. R. 16, Q. B. D. 702]. In the absence of proof, although a different system of jurisprudence may prevail in a colony, the general Law of England will be applied [*Bentinck v. Willink*, 2 Hare 1]; and in the case of land in a particular district of a colony, into which the system prevailing generally in the colony has never been introduced, English Law will be applied [*Lindsay v. Oriental Bank Corporation*, 13 Moo. P. C. C. 401]. And generally, until Foreign Law (under which description Colonial Law is included) is proved to be different, there is a presumption that it is the same as that of England [*Smith v. Gould*, 4 Moo. P. C. C. 21; *Lloyd v. Guibert*, L. R. 1, Q. B. 129].

Law of
Ceylon must
be proved in
courts in
England.
Effect of
absence of
proof.

As an alternative to proving Foreign Law by the evidence of an expert, 22 and 23 Vict. c. 63 provides for the remission of cases by courts in one part of Her Majesty's dominions for the opinion in law of a court in any other part thereof [see *Lord v. Colvin*, 29 L. J. Ch. 297; 1 Drew. & Sm. 24]; and 24 Vict. c. 11 enacts that Superior Courts within Her Majesty's dominions

Alternative
to proof.

c. 122 (Admiralty Offences); 24 and 25 Vict. c. 11 (Foreign Law Ascertainment); 30 and 31 Vict. c. 124 (Merchant Shipping Act Amendment), s. 11; 37 and 38

Vict. c. 94 (Conveyancing, Scotland), s. 51; 44 and 45 Vict. c. 69 (Fugitive Offenders); 48 and 49 Vict. c. 74 (Evidence by Commission).

may in any action remit a case to the court of any Foreign State with which Her Majesty may have made a convention for that purpose, to ascertain the law of such State.

Proof of Ordinances.

But as to Ordinances passed by the Legislative Council, these may be proved by copies certified by the proper officer [28 and 29 Vict. c. 63, section 6]; and a Proclamation purporting to be published by the Governor in any newspaper of the Colony signifying Her Majesty's disallowance of a law is *prima facie* evidence of such disallowance, and, similarly, as to Ordinances reserved for Her Majesty's assent and assented to by Her Majesty [28 and 29 Vict. c. 63, section 6].

Proclamations, &c., how to be proved.

Proclamations, Treaties, and other Acts of State may also be proved by examined or duly authenticated copies [14 and 15 Vict. c. 99, section 7; *Clarke v. Emery*, 1 F. & F. 446].

Administration of justice under the Dutch Government. Statutes of Batavia.

Under the Dutch Government justice was administered partly according to the Dutch Laws, partly according to the Statutes of Batavia and to the ancient usages and institutions of the natives.

About the year 1749 the Supreme Government of the Dutch in India promulgated a system of law for the administration of justice in their respective settlements. That system was known by the name of the Statutes of Batavia. By altering or modifying the jurisprudence of Holland it was, by these statutes, sought to reconcile the Government of the Company to the spirit of the natives, and although they had never received from the superior tribunals of the Republic the sanction of law, still their local utility had induced their adoption in all the colonies. These statutes regulated in the early years of British rule the functions and duties of the different courts of justice and police in Ceylon.*

* The above is from what is known as "Cleghorn's Minute." Cleghorn held the office of "Secretary and Registrar of the

Records of the Island of Ceylon" under the British Government. He was appointed in 1798 under the Royal Sign Manual. The

The Roman-Dutch Law proper is composed of the Civil Law and of such Ordinances and edicts as the supreme authority in Holland from time to time enacted. As these Ordinances related in a large measure to the feudal tenure, the regulation of dyke rights, and other matters which can have no application in Ceylon, the Roman-Dutch Law, as administered here, approaches more nearly to Civil Law than it did when administered in Holland [1 Thompson, p. 7].

The Roman-Dutch Law. What it is composed of.

The whole of the Dutch Law as it prevailed in Holland more than a century ago was never bodily imported into this country. We have only adopted and acted upon so much of it as suited our circumstances, such as the Law of Inheritance in the Maritime Provinces, Community of Property, Law of Mortgage, and so forth. The Dutch Law of continuing community after the death of a parent between the surviving parent and the children was never adopted by us [*per* Dias, J., in *Wejeyekoon v. Gunewardene*, 1 S. C. R. 147; 2 C. L. R. 59].

How much of the Dutch Law is introduced into Ceylon.

In *Seyadoris v. Hendrick* [1 S. C. R. 152] the Supreme Court held that there was no authority for the position that jurisdiction to enforce the Roman-Dutch Law as to issue of writs of sequestration as a remedial measure for the protection of property, the subject of litigation, *pendente lite*, was granted to District Courts; that District Courts were the creatures of the Charter and the Ordinances succeeding it; and there was nothing which gave them authority generally to administer the Dutch Law, nor had any general right to grant sequestration which existed under the Dutch Law ever been exercised by them.

Practice as to issue of writs of sequestration.

The effect of Regulation No. 13 of 1822 and Ordinances No. 8 of 1834 and No. 22 of 1871 was to sweep

The Roman-Dutch Law of Prescription.

"Minute" is dated the 1st June, 1799, and is on the Administration of Justice and of the Revenues under the Dutch

Government. See also Answers of Sir Richard Otteley, C. J., to the Royal Commission of Inquiry of 1830. Ans. 15.

away all the Roman-Dutch Law relating to the acquisition of title in immovable property (including positive and negative servitudes) by prescription, except as regards the property of the Crown. Hence the only law relating to the acquisition of private immovable property by prescription is to be found in the 3rd section of Ordinance No. 22 of 1871. That section determines the mode of acquisition of a prescriptive title [*Terunnanse v. Menika*, 1 N. L. R. 200.]

Where the Roman-Dutch Law is silent, recourse must be had to the laws of Rome [Sir Richard Ottley's Answers to the Royal Commission of Inquiry of 1830. Ans. No. 18].

Kandyan
Law.

The Kandyan had no written laws, and no record whatever of judicial proceedings was preserved in civil or criminal cases. There was therefore nothing to restrain the arbitrary will of the Judge, and nothing to guide the opinion of the Sovereign, Judge, and the Chiefs but tradition and living testimonies [see Marsh. Judg. 295]. The outlines in different modern treatises of those principal institutions and customs, which are supposed to have been most generally acknowledged and are laid down as sanctioned by precedents and existing practice, are, therefore, imperfect and liable to many errors.

How, where
Kandyan Law
is silent.

Where there is no Kandyan Law or custom having the force of law applicable to the decision of any matter or question arising for adjudication within the Kandyan Provinces, for the decision of which other provision is not specially made in Ordinance No. 5 of 1852, recourse is to be had to the law as to the like matter or question in force within the Maritime Provinces [Ordinance No. 5 of 1852, section 5]. By section 7 of this Ordinance the Criminal Law of the Maritime Provinces was extended to the Kandyan Provinces; and section 10 provided that the Code of Mohammedan laws entitled "Special Laws concerning Moors or Mohammedans,"

promulgated on the 5th August, 1806, and ordered to be observed throughout the whole of the "Province of Colombo," should extend and be applied to the like cases, matters, and things between Mohammedans residing within the Kandyan Provinces, and in other parts of this Colony, unless in any case other provision was made by any other Ordinance.

Law applicable to Mohammedans in Kandyan Provinces.

The succession *ab intestato* to the property of Europeans and Burghers in the Kandyan Provinces is, subject to the provisions of "The Matrimonial Rights and Inheritance Ordinance, 1876," the same as in the Maritime Provinces [Ordinance No. 5 of 1852, section 8]; and marriages of Europeans and Burghers not valid in the Maritime Provinces are invalid in the Kandyan Provinces [section 9].

To Europeans and Burghers.

"The Matrimonial Rights and Inheritance Ordinance, 1876," applies to Kandyans, Mohammedans, and Tamils who are subject to the Thesavalamai, to the extent that when a woman marries, after the proclamation of the Ordinance, a man of different race or nationality from her own, she is to be taken to be of the same race and nationality as her husband for all the purposes of that Ordinance, so long as the marriage subsists and until she marries again [section 2].

"Matrimonial Rights and Inheritance Ordinance, 1876."

In the three consolidated cases from the District Court of Kandy—(1) *In the Matter of the Insolvency of Durand Kershaw*; (2) *Kershaw v. Nicoll et al.*; and (3) *Nicoll v. Le Pelly* [Ram. for 60-62, p. 157]—the question arose whether the Kandyan Law applied to Europeans who had become resident in the Kandyan Provinces; and the Supreme Court, having specially considered the provisions of Ordinance No. 5 of 1852, held that, apart from other reasons, the Ordinance itself amounted to a legislative declaration that, before it was passed, the Kandyan Law extended to all persons in the Kandyan territory, and that it was to continue so to extend, except in the particular cases wherein the

Kandyan Law and Europeans resident in Kandyan Provinces.

Ordinance itself introduced new law into Kandyan territory, or exempted particular classes of Kandyan residents from the operation of the old Kandyan Law.* In determining, therefore, the status of the parties to the case as to community of goods and as to the wife's ability or disability to acquire, to hold, and to deal with property independently of her husband, the Supreme Court felt bound to apply the Kandyan Law as being the law of their actual and matrimonial domicile.

Williams v.
Robertson.

The point involved in these cases was considered in *Williams v. Robertson* [8, S. C. C. 36], and the Supreme Court overruled the above decision and held that it was not possible for Europeans or Eurasians settled in the Kandyan territory to acquire a "Kandyan" domicile as distinguished from a Ceylon domicile; nor are their wives, by reason of their matrimonial domicile, subject to the incidents of the "Kandyan" matrimonial laws, so as to be capable of acquiring and holding property independently of their husbands. The Kandyan Law applies to the Kandyan Sinhalese within the Kandyan Provinces: it does not apply to the case of a Low-country Sinhalese who is settled there [see *Wijesinghe v. Wijesinghe*, 8, S. C. C. 199].

Laws of
Marriage of
Immigrant
Tamils of
Kandyan
Provinces.

Ordinance No. 3 of 1870—"An Ordinance to amend the Laws of Marriage in the Kandyan Province"—applies to Kandyan only; and so the marriages of immigrant Tamils resident in the Kandyan Provinces are not regulated by the Kandyan Marriage Laws [*Narayana v. Muttusamy*, 3 S. C. R. 125].

Laws of
Moors in
Kandyan
Provinces.

The Moors domiciled in Kandy enjoy the privilege of being governed by their own laws and customs of inheritance and marriage, which are founded on their religion [*Saibo Tamby v. Ahmat*, Ram. for 43-55, p. 163].

* See clause 2 of Proclamation of the 31st May, 1816.

By Regulation No. 18 of 1806 it was provided that [section 6] the “Thesawalamai, or customs of the Malabar inhabitants of the Province of Jaffna, as collected by order of Governor Simons in 1706, should be considered to be in full force;” and that [section 7] all questions between Malabar inhabitants of the said Province, or wherein a Malabar inhabitant is defendant, should be decided according to the said customs.”

The Thesawalamai.

The “Province of Jaffna” never included Trincomalee and Batticaloa, and the law governing the Malabar inhabitants of these two places is the Roman-Dutch Law, and not the Thesawalamai [*Wellapulla v. Sitambalem*, Ram. for 72-76, p. 114.]

“Province of Jaffna.”

In the absence of any rule of the Thesawalamai applicable to any particular question as to succession to property, recourse is to be had to the Roman-Dutch Law [*Puthatamby v. Mailvakanam*, 3 N. L. R. 42].

Where Thesawalamai is silent, what law to apply.

So much of the Thesawalamai as requires publication and schedule of intended sales or other alienations of immovable property is repealed by Ordinance No. 4 of 1895.

The Mohammedan Law in force in Ceylon is that contained in the Code adopted by the Governor in Council on the 5th August, 1806. The “Code” was submitted to the Governor in Council by the Chief Justice as including the Mohammedan laws observed by the Moors in the “Province of Colombo,” and acknowledged by the head Moormen of the district to be adapted to the usages of the caste. On the motion of the Chief Justice it was resolved that the same be published and observed throughout the whole of the Province of Colombo.

Code of Mohammedan Laws.

The Mohammedan Law of India or other places does not necessarily obtain in Ceylon. The laws of the Mohammedan inhabitants of Ceylon, when not regulated by enactment, must be determined by usage and

Mohammedan Law of India.

their laws as existing here [D. C., Colombo, 59,578, Grenier for 73-74, p. 28]. The question in the case cited here was whether the Roman-Dutch Law of *Fidei Commissum* was applicable to the Mussulman natives of this country; and Berwick, District Judge, in the course of his judgment (affirmed by the Supreme Court), in which he held that it was, observed as follows:—"While it is true, in a sense, that Mohammedan Law is part of the Common Law of this country, it is not to be supposed that the whole immense body of Mohammedan jurisprudence is law here, or that the dealings of Moormen in Ceylon are solely or even principally regulated by it. Only such parts of that system are law here as have been specially introduced into the Island, either by express legislation or by ancient, continuous, and inveterate custom or usage, which is all the Charter of 1801 meant. It is in nearly the same position in this respect as the Common and Statute Law of England here, and equally with purely English Law must give place to the ordinary law of the country, which in the last resort is the Roman-Dutch, whenever there is no inveterate and established practice to the contrary applicable to the particular case" [Gren. for 73-74, see page 29].

Where Code
of Mohammedan
Law is
silent, what
law to apply.

When the Code of Mohammedan Law adopted in 1806 is silent on any point, resort should be had to the Common Law of Ceylon [*Ibrahim Saibo v. Muhammadu*, 3 N. L. R. 116].

The
Mukkuva
Law.

* The Mukkuvars of Ceylon are a class of Tamils chiefly found in the Districts of Calpentyne, Jaffna, and Batticaloa. The Calpentyne Mukkuvars are either Christians or Mohammedans, and were subject to the general laws of inheritance applicable to the Christian and Mohammedan inhabitants of the Maritime Provinces of the Island. The Mukkuvars of Jaffna and

* From Mr. C. Brito's Introduction to his Treatise on the Mukkuva Law.

Batticaloa are Sivites with a sprinkling of Christians among them. Whether Christian or Sivite, these Mukkuvars had their succession to intestate property regulated, in Jaffna, by the Thesawalamai of that Province; in Batticaloa, by a custom peculiar to themselves. That custom was commonly called "The Mukkuva Law." Customs of a similar nature are known to exist in some parts of India also. "The true origin of Mukkuva Law," says Mr. Brito, should, probably, "be looked for in those primitive times when the Mukkuvars had no rules of moral or positive law to determine the paternity of their offspring."

The Mukkuva Law of Batticaloa was involved in much uncertainty. The only reliable materials were a few decisions of the District Court and the Court of Requests of Batticaloa. Some of those decisions had been reviewed in appeal by the Supreme Court, and the points determined therein had become settled law. Still there remained a great many more points.

Ordinance No. 15 of 1876 would appear to have swept away the Mukkuva Law of Inheritance altogether, there being no provision in it saving the operation of that law as it has of the Kandyan Law, the Mohammedan Law, and the Thesawalamai [section 2].

Effect on
Mukkuva Law
of Ordinance
No. 15 of 1876.

CHAPTER II.

PREROGATIVE.

Meaning of
"Prerogative."

BY the word "Prerogative" we usually understand that special pre-eminence which the king has over and above all other persons and out of the ordinary course of Common Law in right of his royal dignity. It must be in its nature singular and eccentric, and it can only be applied to those rights and capacities which the king enjoys alone; that is, in contradistinction to those which he enjoys in common with any of his subjects [Bl.* I. 238.]

Prerogatives,
direct or
incidental.

Prerogatives are either *direct* or *incidental*. The *direct* are such positive substantial parts of the royal character and authority as are rooted in and spring from the king's political person, considered merely by itself, without reference to any other extrinsic circumstance: as, the right of sending ambassadors, of creating peers, and of making war or peace. But such prerogatives as are *incidental* bear always a relation to something else, distinct from the king's person, and are indeed only exceptions, in favour of the Crown, to those general rules that are established for the rest of the community: such as that no costs shall be recovered against the king; that the king can never be a "joint tenant," as that term is understood in English Law; and that his debt shall be preferred before a debt to any of his subjects† [Bl. I. 239].

Direct
prerogatives.

Incidental
prerogatives.

Examples.

* Joseph Chitty's Edition of Blackstone's Commentaries on the Laws of England.

† This prerogative of preference in case of debts has been the subject of legislation in Ceylon. By section 5 of Ordinance No. 14 of 1843 all debts due to Her Majesty from any

other persons than officers and public accountants mentioned in the preceding section are to have preference over all subsequent specialties, or other debts contracted by such Crown debtors in favour of any other person.

The Supreme Court has held

This prerogative of the Crown, when not expressly limited by local law or statute, is as extensive in the Colonies as in Great Britain, and gives a Colonial Government priority in bankruptcy in respect of a simple contract debt [*Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, J. C. (1892) A. C. 437].

that under this section the Crown, as creditor of an insolvent estate, has a preferential right over other creditors in respect of debts due on duties, taxes, or tribute [Ram. 1820-23, p. 158]; that the Government possesses a general hypothec over the property of its debtors, and has a right to prevent all alienations of such property [Marsh. Judg. 532; Austin, 28; Morg. Dig. 56]; but that this right does not commence until the debt has actually accrued due, except in an extreme case, as where a person is endeavouring to alienate his property obviously with the fraudulent intention of defeating a debt about to become due; that rent reserved to the Crown by a lease constitutes a Crown debt within the scope of section 5 of the Ordinance; that the Crown's legal hypothec over the debtor's property attaches from the date of the lease, and not from the date when the particular instalment of rent fell into arrear in respect of which a breach of the lease was committed [*Attor.-Gen., v. Rajapakse*, 7 S. C. C. 139]; and that an arrack renter is a Crown debtor under section 5 of Ordinance No. 14 of 1843 from the date of the purchase of the rent, and the Crown has a preferential claim on his property over all subsequent special mortgagees [Vand. 89; Creasy, 136].

Section 4 of the Ordinance enacts that all lands and tenements which any officer employed in the collection, &c., of the revenue or other property belonging to Government may have, shall be liable for the payment of

all arrearages, debts, &c., due to Her Majesty from such officer, and the said lands and tenements and all other property of such officer shall be seized and sold in execution for the payment of all such arrearages, debts, &c., as may be adjudged due to Her Majesty by any competent court of law in like and as large and beneficial a manner, to all intents and purposes, as if the said officer had, the day he became such officer as aforesaid, specially mortgaged the said lands and tenements to Her Majesty for the full payment of such arrearages or debts, &c., and had also, at the same time, by a notarial bond, acknowledged the said arrearages or debts, &c., to be due to Her Majesty.

It has been held that, under this section, the claims of the Crown against the property of its officers are preferent to those of a special mortgagee and vendor who held the land in mortgage for the balance purchase amount, and that sureties to the Crown paying the debt of the principal are entitled to the rights of the Crown without cession of action [*Saibo Dore v. Bawa*, 3 Lor. 319; Jos. & Bev. 61]; that the claim of the Crown against its officers dates from the date of the defaulting officer's first appointment, and is preferential to a creditor's mortgage subsequent to that date [Gren. for 1873, p. 26]; and that the joint estate of husband and wife is liable for debts, under this section, of husband to the Crown [*Queen's Advocate v. Sivagamipulle*, 6 S. C. C. 46].

Direct prerogatives divided into three kinds, viz., such as regard I., the king's royal character; II., his authority; III., his royal income.

How prerogatives are distinguished by foedal writers.

The *majora* and *minora regalia*.

The exercise of royal prerogatives in a conquered or ceded country.

These substantive or direct prerogatives may again be divided into three kinds ; being such as regard, first, the king's royal character; secondly, his royal authority; and lastly, his royal income. Foedal writers, however, distinguish the royal prerogatives into the *majora* and *minora regalia*. In the former of these two classes they rank the prerogatives which relate to the king's political character and authority; in the latter, those which relate to the royal revenue [Bl. I. 241]. In the words of one of them, "*majora regalia imperii præminentiam spectant; minora vero ad commodum pecuniarium immediate attinet; et hæc proprie fiscalia sunt, et ad jus fisci pertinent* [Peregrin. de jure fisc. l. 1, c. 1, num. 9].

A question here arises, how far these royal prerogatives can be exercised in a conquered or ceded country. In the case of the *Mayor of Lyons v. East India Co.* [Moore, P. C. R. 283] it was contended for the Crown that the whole royal prerogative is necessarily introduced into a conquered or ceded colony, but from the decision in that case it would appear that only those prerogatives incident to sovereignty are so introduced. The principle here laid down was acted on in a judgment of great learning and research delivered by the late District Judge of Colombo, Mr. Berwick, and the Supreme Court apparently sanctioned the principle, for it is not refuted in its judgment [D. C., Colombo, 1,245, Vand. Rep. 83].

The following extract from Chitty will throw some light on the subject :—"Though allegiance be due from every one within the territories subject to the British Crown, it is far from being a necessary inference that all the prerogatives which are vested in the king by the English Laws are, therefore, exercisable over individuals within those parts of his dominions in which the English Laws do not as such prevail.

Doubtless those fundamental rights and principles on which the king's authority rests, and which are necessary to maintain it, extend even to such of his dominions as are governed by their own local or separate laws. The king would be nominally and not substantially a Sovereign over such his dominions, if this were not the case. But the various prerogatives and rights of the Sovereign which are merely local to England, and do not fundamentally sustain the existence of the Crown or form the pillars on which it is supported, are not, it seems, *primâ facie* extensible to the colonies or other British dominions which possess a local jurisprudence distinct from that prevalent in and peculiar to England. To illustrate this distinction: the attributes of the king—sovereignty, perfection, and perpetuity—which are inherent in and constitute his political capacity, prevail in every part of the territories subject to the English Crown, by whatever peculiar or internal laws they may be governed. The king is the head of the Church, is possessed of a share in legislation, and is generalissimo throughout all his dominions; and in every part of them he alone is entitled to make war and peace" [Ch.* 25].

It may here be mentioned that when, as was the case with Ceylon, a country is obtained by conquest or treaty, the king possesses an exclusive prerogative power over it, and may entirely change or new-model the whole or part of its laws and political form of government, and may govern it by regulations framed by himself. As, however, a country conquered by British arms becomes a dominion of the king in right of his Crown, it is necessarily subject to the legislative power of Great Britain; and, consequently, the king's legislative power over it, as conqueror, is subordinate

Right of the Sovereign to change the laws and political institutions of a conquered country.

* Chitty on Prerog., Edition 1.

It is subordinate to his own authority in Parliament.

The king cannot violate the terms on which a country is surrendered or ceded.

Laws of a conquered country remain until changed by the Sovereign. Where laws of a conquered country are silent, what laws are to govern.

How the king may preclude himself from the exercise of legislative authority in a conquered country.

The king cannot depart from the provisions of a Charter.

The king's prerogatives in a country to which a

to his own authority in Parliament, so that he cannot make any change contrary to fundamental principles, or exempt the inhabitants from the power of Parliament. Nor can the king legally disregard or violate the articles on which the country is surrendered or ceded; but such articles are sacred and inviolable, according to their true intent and meaning. It is necessary and fit that the conquered country should have some laws; and, therefore, until the laws of the country thus acquired are changed by the new Sovereign they still continue in force [Ch. 29]. So, where the laws of the vanquished territory are rejected, without the substitution of other laws, or are silent on any particular subjects, such territory is to be governed according to the rules of natural equity and right [2 Salk. 412]. The king may preclude himself from the exercise of his prerogative legislative authority in the first instance, over a conquered or ceded country, by promising to vest it in an assembly of the inhabitants and a Governor, or by any other measure of a similar nature, by which the king does not claim or reserve to himself this important prerogative [Cowp. 204].

It is, indeed, a most sound and important principle that though the king may keep in his own hands the power of regulating and governing the inhabitants, he cannot infringe or depart from the provisions of a Charter by which he has, though voluntarily, granted them any liberties or privileges, although it would appear that he can withdraw a Charter and grant fresh Charters in cases of positive necessity and upon an extraordinary exigency [1 Chalm. 31, 29, 188, 189]. In every question, therefore, which arises between the king and his colonies respecting the prerogative, the first consideration is the Charter granted to the inhabitants. If that be silent on the subject, it cannot be doubted that the king's prerogatives in the colony are precisely those prerogatives which he may exercise

in the mother-country. The prerogative in the colonies, except where it is abridged by grants, &c., made to the inhabitants, is that power over the subjects considered either separately or collectively, which by the Common Law of England, abstracted from Acts of Parliament, and grants of liberties, &c., from the Crown to the subject, the king could rightfully exercise in England* [Ch. 33 citing Chalmers' Coll. of Op. 232, 3]. Where the Colonial Charters afford no criterion or rule of construction the Common Law of England, with respect to the royal prerogative, is the Common Law of the colonies; and statutes in affirmance of such Common Law made before the settlement of the colony *primâ facie* bind therein [Ch. 33]: but clearly Acts of Parliament in England do not bind the colonies unless expressly named, or the words "and all other the king's dominions," or similar expression, be used [1 Chal. 194; Bl. 107].

Charter is granted.

Where the Charter is silent.

The king's prerogative in the colonies.

No Acts of Parliament in England bind the colonies.

On this distinction it has been considered that if the peculiar laws granted by Charter to a colony do not expressly prevent it, the king may erect courts of justice and exchequer therein [2 Chal. 176]. Indeed, the jurisdiction of the Colonial Judicatories in point of law invariably emanate from the king, under the modifications of the Colonial Assemblies [2 Chal. 242]. And the Crown may also extend the privilege of sending representatives to the Colonial Assemblies to new towns [1 Chal. 272 *et pass.* and 276 *et pass.*]; may order a *nolle prosequi* to be entered on prosecutions in the colonies [2 Chal. 178]; is entitled to present to vacant benefices—a power which it exercises through the medium of the Governor [1 Chal.

The king's right to erect courts of justice in colonies.

* Thompson does not agree with the doctrine here expressed. He says [Institutes I. 9]:—"Mr. Chitty has here cited an opinion from Chalmers, and has applied to *all* colonies an

opinion intended only for the West Indies, which, though conquered, were treated as unoccupied countries, and whose Common Law is the Common Law of England."

Legislative
power of
Colonial
Assemblies.

Right of the
king to alter
the constitu-
tion of a
colony.

18, 23]; and to have royal mines, treasure-trove, escheats (as ultimate lord of the soil), royal fish, &c., therein [1 Chal. 120 *et pass.*]. Nor can any of the Colonial Assemblies make laws unless empowered by the Crown so to do [1 Chal. 261]; and if, when empowered, they exceed the prescribed limits, their enactments are void [1 Chal. 28]. There can be no doubt that the king may alter the constitution of a colony, where such constitution has not been granted by Charter, and is not founded on or fixed by any legal and confirmed Act of Colonial Assembly; but merely by his instructions to the Governor [1 Chal. 267]. So, where peculiar laws and process exist, the king himself, even in seeking to recover his own debts therein, must resort to those laws for redress [1 Chal. 58]. And the king cannot tax a colony of English subjects but through the medium of Parliament or the representative assembly of the colony [1 Chal. 58].

If the king lose a territory acquired by conquest and reconquer it, the former rights of the inhabitants, under Charters granted by the Crown, revive, and are restored, *jure postliminii*; a conquest by an enemy merely operating as a suspension, not as an extinguishment, of the rights of former owners [1 Chal. 108].

To revert to the different classes of *direct* prerogatives. We have said [p. 22] that they are divisible into such as regard, first, the king's royal *character*; secondly, his royal authority; and, lastly, his royal income.

I.—Prerogatives
regarding
the king's
royal
character.

First, then, of the royal dignity. The law ascribes to the king, in his high political character, not only large powers and emoluments which form his prerogative and revenue, but likewise certain attributes of a great and transcendent nature; by which the people are led to consider him in the light of a superior being, and to pay him that awful respect which may enable him with greater ease to carry on the business of Government. This is what is understood by the term

“royal dignity.” It comprises several branches [Bl. I. 241].

(1) First, the law invests the king with the attribute of sovereignty or pre-eminence. “*Rex est vicarius*,” says Bracton, “*et minister Dei in terra : omnis quidem sub eo est, et ipse sub nullo, nisi tantum sub Deo*” [l. 1, c. 8]. He is said to have *imperial* dignity, and to be the supreme head of the realm in matters both civil and ecclesiastical, and of consequence inferior to no man upon earth, dependent on no man, accountable to no man, and owes no kind of subjection to any other potentate upon earth. Hence it is that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him [Bl. 211, 212].

(1) Sovereignty or pre-eminence.

The subjects of England are, however, not totally destitute of remedy in case the Crown invade their rights either by private injuries or public oppressions.

Remedies of subjects against him.

First, as to *private injuries*.—If any person has, in point of property, a just demand upon the king, he must petition him in his Court of Chancery, where his Chancellor will administer right as a matter of grace, though not upon compulsion [Bl. I. 242]. The delay and expense attending this proceeding by petition [*petition de droit*] induced the Legislature to afford the subject a much more summary method of interpleading with the Crown. This was effected by extending and rendering almost universal the remedies by “*monstrans de droit*” and “*traverse of office*.” [As to these see Ch. 352 and 356]. The proceedings on these remedial petitions are now conducted in England on the same principles as ordinary suits.

For private injuries, by petition in Chancery.

In Ceylon, the Crown has been held to have waived the immunity from being sued. The point was first decided in 1868 in the case of *Fraser v. Queen's Advocate* [Creasy's Rep. part I. p. 1 ; Ram. 63–68, p. 316] by the then Chief Justice, Sir Edward Creasy. In an

Waiver, in Ceylon, by the Crown of its immunity from being sued.

Fraser v.
Queen's
Advocate.

elaborate judgment the Supreme Court held that the Crown had been pleased to lay aside as to this Island part of the prerogative of the Crown as to immunity from being sued. The words of the Proclamation of the 23rd September, 1799, on which the decision of the court on that point was based are as follow :—"That the administration of justice and police in the settlements and territories of the Island of Ceylon shall be henceforth exercised by all Courts of Judicature according to the laws and institutions that subsisted under the ancient Government of the United Provinces.*

Section 111 of Ordinance No. 11 of 1868, in which was incorporated the old Charter of 1833, and the subsequent enactments affecting the administration of justice, provides for the representation of the Crown in the courts of this Island by the Queen's Advocate. The particular words are as follow:—"The Crown may be represented in every court in which it is a party interested by the Queen's Advocate." In section 117 of the same Ordinance we find the first allusion to actions raised *against* the Crown as follows : "*All suits* instituted by any private party against the Queen's Advocate, wherein the amount or value in dispute exceeds ten pounds, shall, unless the Queen's Advocate consents to forego such right, be instituted and prosecuted in the District Court held at the principal town of the Province in which the act shall have been done." This appears to be the only statutory enactment wherein the right to sue the Crown is expressly stated in so many words, and even here it is by implication and not by formal words of enactment; as if the right to sue the Crown had been before then granted, and this was merely a provision for the more

* It is submitted as open to doubt that the words "administration of justice," as here used, embraced the Crown. They appear as intended to refer merely to the administration of justice between subject and subject.

convenient exercise of that right. On referring to section 4 of the repealed Ordinance No. 12 of 1843, which was to the same general effect, we do not find any provision made as regards cases instituted against the Queen's Advocate by private parties or others. In that Ordinance no reference is anywhere made to suits brought against the Queen's Advocate. This may be explained by the circumstance that no provision is here made for the institution of Crown suits in the principal District Court of the Province. The part of section 117 of Ordinance No. 11 of 1868 above referred to has apparently been founded on the decision of *Fraser v. Queen's Advocate* [*ante*, p. 27].

In this case it was also held that a public servant could not sue the Colonial Government through the Queen's Advocate in this Colony for the omission by the Imperial Government to pay salary due under an Imperial appointment. An action by the Crown had also to be raised in the name of the Queen's Advocate as required by Ordinance No. 11 of 1868. So, in an action for breach of contract entered into by the defendant with a Government Agent, the libel was intituled "Our Sovereign Lady the Queen v. M. A. F.," and purported to be a statement made by the Queen's Advocate as informant. The District Court having refused to enter up judgment by default on the ground that the action was not properly intituled, the Supreme Court declined to interfere with the refusal [*Queen v. Fernando*, 5 S. C. C. 67]. In *Jayawardene v. Fernando* [4 S. C. C. 77, 133], which was an action upon a contract with a Government Agent acting on behalf of the Government, the plaintiff sued the Queen's Advocate as representing the Crown. The Queen's Advocate demurred to the libel on two grounds: first, that the Crown could not be impeached at law by a subject, and that the latter's only remedy was by petition of right; and secondly, that even if the Crown could be sued,

Right of public servant to sue the Colonial Government for salary under an Imperial appointment.
Actions by the Crown.

Liability of Crown to be sued in actions arising *ex contractu*. Proper party to be sued.

there was no enactment which made the Queen's Advocate the representative of the Crown in suits against the Crown; but the Supreme Court held that the Crown might be sued in actions arising *ex contractu*, and that the proper mode was to sue the Queen's Advocate as representing the Crown; that the matter was one of procedure merely, as no execution could issue in such an action either against the property of the Crown or the Queen's Advocate, and the satisfaction of a judgment against the Crown would be a matter of grace only; and that the prerogative of the Crown in not being liable to a suit had been waived in this Colony so far as regarded this mode of procedure, whereby a subject was permitted to substantiate his claim on the Crown by a suit against the Queen's Advocate.

Siman Appu
v. Queen's
Advocate.

This question of the right of the subject to sue the Crown in Ceylon was considered by the Privy Council in the case of *Siman Appu and others v. Queen's Advocate* [L. R. A. C. vol. IX., p. 571], and it was there held that there was no authority for saying that the Roman-Dutch Law empowered the subject to sue the Government; but since the conquest a very extensive practice of suing the Crown had sprung up and had been recognised by the Legislature in Ceylon, and that such suits were now incorporated into the law of the land. In the course of their judgment their Lordships observed:—"There certainly seems no more antecedent reason why the Counts of Holland should be exempted from suit through their officers than existed for the exemption of the King of Scotland. And though it is very likely that whilst great potentates like the Dukes of Burgundy and the Kings of Spain were Counts of Holland, it would not be very safe to sue them, yet when the United Provinces became independent suitors might find themselves more favourably placed. But, whatever speculations may be made upon these points, their Lordships cannot advise

Her Majesty that such was the Roman-Dutch Law, unless it is shown to them that it was so; and neither the researches of counsel nor their own have enabled their Lordships to attain any certainty on the subject : That a very extensive practice of suing the Crown has sprung up is certain Whatever may be the exact origin of the practice, it was doubtless established to avoid such glaring injustice as would result from the utter inability of the subject to establish his claims; and finding that the Legislature recognised and made provision for such suits at least twenty-eight years ago, their Lordships hold that they are now incorporated into the law of the land."

In the recent case of *Sandford v. Waring* [2 N. L. R. 361], however, Bonser, C.J., pointed out that there was authority for the proposition that under the Roman-Dutch Law it was open to the subject to sue the Government of the United Provinces through its officers. In the course of his judgment he said:—"That some such remedy against the Fisc or Imperial Treasury existed under the Roman Law, is plain from the language of Voet: '*Non tamen hanc patiuntur actionem (i.e., rei vindicatio) qui rem alienam a fisco emerunt, aut a Principis vel Augustæ domo: eo quod hi statim securi sunt; sola adversus fiscum actione intra quadriennium indulta iis, qui pro rei alienatæ dominio putaverint aliquam sibi competere petitionem*' [Com. ad Pand. 6 l. 23]. So also, treating of the sale of an *hereditas*, he says that the purchaser is safe '*cum ementes a fisco statim securi sint et fiscum ipsum vendentem convenire debeat, quisquis iudicio contendere cupit, ad se venditam pertinere hereditem*' (18. 4. 8). The same passages show that in Voet's opinion that was the Law of Holland in his day, and this right to sue the Fisc is recognised in *Hollandsche Consultatien* [Bk. IV. 128].

*Sandford v.
Waring.*

"There is a curious case mentioned by Kotze, C. J., of the Transvaal, in the notes to his translation of

Van Leeuwen's Commentaries (p. 11), from which it appears that the Sovereign States of Holland submitted themselves to the jurisdiction of their own court, and on the 28th July, 1501, were ordered, as defendants, to pay unto Philip of Spain, the plaintiff, compensation for damages which had been caused to his house in Rotterdam.

"Again, I find a case in the *Hollandsche Consultation*, B. IV. 123, where the Fiscal of North Holland, on being sued, excepted to the plaintiff's right to sue on the following grounds:—'*Quasi Fiscus qui principem representat, in jus vocari non possit sine venia, de jure autem vasallus dominum subditus principem in jus vocare absque venia non potest, argumento sumpto a liberto ad Patronum.*' The plaintiff replied that the plea ought to be rejected, '*quia inquit hoc non solere in Principe observari*' (for actions were brought every day against the Procureur-General and Fiscal) '*qui fiscus sunt principem que representatit non petita venia,*' and the court accordingly overruled the plea and ordered the defendant to answer. It does not appear that these authorities were cited to the Privy Council. They would seem to show that the Government of the United Provinces might be sued through its officers."

In this case the Supreme Court held that land in the possession of the Crown could not be recovered in a suit against the servant of the Crown who was in temporary occupation of it as such servant, and that the only way by which a subject could recover his land, which he alleged to be in the wrongful possession of the local Government of this Island, was by an action brought against the Queen's Attorney-General of the Island.

Remedy for
public
oppression.

So far as to remedies against the Crown for invasion of rights of subjects by private injuries. Next, as to ordinary *public oppression*, where the vitals of the

constitution are not attacked, the law has also assigned a remedy. For as a king cannot misuse his power without the advice of evil counsellors and the assistance of wicked ministers, these men may be examined and punished. The constitution has therefore provided, by means of indictments and Parliamentary impeachments, that no man shall dare to assist the Crown in contradiction to the laws of the land ; and as to such public oppressions as tend to dissolve the constitution and subvert the fundamentals of Government, the supposition of law is, that neither the king nor either House of Parliament (collectively taken) is capable of doing any wrong, and, for that reason, all oppressions which may happen to spring from any branch of the Sovereign power must necessarily be out of the reach of any stated rule or express legal provision ; but if ever they unfortunately happen, "the prudence of the times," says Blackstone, "must provide new remedies upon new emergencies" [Bl. I. 243].

(2) Besides the attribute of sovereignty, the law also ascribes to the king, in his political capacity, absolute perfection. The king can do no wrong. This maxim means two things : first, that whatever is exceptionable in the conduct of public affairs is not to be imputed to the king, nor is he answerable for it personally to his people ; and, secondly, that the prerogative of the Crown extends not to do any injury : it is created for the benefit of the people, and therefore cannot be exerted to their prejudice.

In considering the attribute of pre-eminence we have stated that the Sovereign by reason of that prerogative cannot be sued in a civil action on contract. By the attribute now under consideration we further see that he cannot be sued or prosecuted for any action arising from a tort or delict, as it is termed in the Roman-Dutch Law. Where any wrong has been done by the Government the theory is that the Crown has

(2) Absolute perfection. The king can do no wrong.

Actions arising *ex delicto* against the Crown.

been ill-advised, and the advisers of the Crown are held responsible for the evils resulting from that action, even for measures which might possibly be known to emanate directly from the Sovereign [Broom L. M. 53]. This rule is one of practical importance, the effect being that the agents of the Government are liable for torts committed by them, and they cannot plead as an excuse for their unlawful acts the commands of the Government. This is one of the greatest safeguards of the liberty of the subject, and from the Prime Minister to the Police Constable all officials are liable to be sued, prosecuted, or impeached for every unlawful infringement of private rights.

In Ceylon the position of the Crown as to its exemption from actions *ex delicto* has been affected by the circumstance that the Government has become a carrier. By the Ordinance No. 10 of 1865, section 13,* it is enacted that "the Government shall in no case be liable for loss or injury to any articles or goods to be carried by the railway, unless such loss or injury shall have been caused by negligence or misconduct on the part of their agents or servants, and unless the articles or goods in respect of which compensation has been claimed shall have been booked and paid for in conformity with this Ordinance or the rules and regulations in that behalf provided." Hence, in cases of negligence in the carriage of goods by railway an action can be maintained against the Government for negligence. And in actions under this section it is not necessary to prove the default or neglect of any particular agent [see *The Ceylon Co., Ltd. v. The Queen's Advocate*, Ram. for 1872-1876, p. 157]. It was, however, thought that a claim arising *ex delicto* from matters not embraced under this clause of the Ordinance apparently could not be maintained

* Repealed, but re-enacted by section 16 of Ordinance No. 26 of 1885.

against the Queen's Advocate, the Supreme Court in *Fraser v. The Queen's Advocate* (*ante*, p. 27) considering it doubtful whether such an action was ever maintainable against the Advocate Fiscal. And so where a plaintiff sued the Queen's Advocate as representing the Crown to recover damages for certain injuries which the plaintiff had, while travelling as a passenger on the Ceylon Government Railway, personally received in consequence of the negligent, unskilful, and careless conduct of the servants of the railway in respect of the line of railway and of the train in which the plaintiff was travelling, the Supreme Court, on demurrer, held that the cause of action disclosed was a tort or wrong, and consequently that the demurrer of the Queen's Advocate must be upheld [*Newman v. The Queen's Advocate*, 6 S. C. C. 29]; and where a plaintiff sued the Queen's Advocate as representative of the Crown for a tort alleged to have been committed by a Government Agent in his official capacity, it was held that the Crown could not be sued for a tort of this nature [*Hendrick v. The Queen's Advocate*, 4 S. C. C. 76; *Vitanagedere v. The Queen's Advocate*, 6 S. C. C. 72]; but in *Sandford v. Waring* [2. N. L. R. 361] Bonser, C.J., said:—"It seems to have been taken for granted in *Siman Appu v. The Queen's Advocate* [L. R. A. C. vol. IX. 571, see *ante*, p. 30], that an action for tort would not lie against the Crown represented by the local Government of this Island, on the ground that the English Law with respect to the immunity of the Crown from being sued in such actions extends to this Island. I am not prepared, as at present advised, to assent to this proposition. The more recent cases of *Farnell v. Bowman* [12 App. Cases, 643] and *Wemyss v. The Attorney-General of the Straits Settlements* [13 App. Cases, 197] show that at the present day even in colonies in which the English Common Law prevails there is a strong tendency to

make the local Government liable for the acts, even tortuous, of their servants whenever the local enactments can be reasonably construed to create or recognise such a liability. I desire to leave this question open for further consideration when it arises for decision."

Le Mesurier v.
the Attorney-
General.

Subsequently, in his judgment in the case of *Le Mesurier v. The Attorney-General* [3 N. L. R. 227] his Lordship said: "The Roman-Dutch Law allowed persons who had a claim against the Government to sue it as of right (*non petita venia*) through its officer, the Advocate Fiscal, and I may observe in passing that it does not appear that any distinction was made between actions of tort and other actions. The rule of English Law that the Crown cannot be sued in tort depends on the maxim which appears to be peculiar to that law: *Rex non potest peccare*, 'The king can do no wrong.' I am not aware of any authority for the proposition that the Government of the United Provinces ever claimed the attribute of impeccability. For some time after the cession the office of Advocate Fiscal continued under the English Government. Subsequently, in 1834, the title of the officer was changed to King's Advocate, and more lately to that of Attorney-General, but the change was merely in name. The present Attorney-General is the lineal successor of the old Advocate Fiscal as representing the local Fisc or Treasury." This was an action for damages for the wrongful dismissal of a public servant. The Attorney-General was the defendant, and it appeared on the face of the plaint that he was sued not in his private capacity, but as representing the "Government of Ceylon." The court below dismissed the action on the ground that the Attorney-General represented the Crown and not the "Government of Ceylon." The Supreme Court held that the action was really one against the Crown, and was rightly brought against the defendant in accordance with section 456 of the Civil Procedure Code.

Suit against
the Attorney-
General as
representing
the "Govern-
ment of
Ceylon."

The king, moreover, is not only incapable of doing wrong as explained already [*ante*, p. 33], but can never mean to do an improper thing : in him is no folly or weakness [Bl. Com. 246].

Notwithstanding this personal perfection which the law attributes to the Sovereign, the constitution has allowed a latitude of supposing the contrary, in respect to both Houses of Parliament ; each of which, in its turn, has exerted the right of remonstrating and complaining to the king even of those acts of royalty which are most properly and personally his own, such as messages signed by himself and speeches delivered from the throne. This privilege of canvassing the personal acts of the Sovereign belongs to no individual, but is confined to the two Houses, where, however, the objections must be proposed with the utmost respect and deference [Bl. Com. 247].

Privilege of Parliament to remonstrate against personal acts of the Sovereign.

In further pursuance of this principle, the law also determines that in the king can be no negligence, or laches, and therefore no delay will bar his right. *Nullum tempus occurrit regi* was the standing maxim upon all occasions. This rule, however, is now subject to various exceptions, both at Common Law and by statute. After fifty years' possession a grant from the Crown may be presumed, unless a statute has prohibited such a grant [*Goodtitle v. Baldwin*, XI., East, 488]. In civil actions relating to landed property, by the 9 Geo. III., c 16, the king, like a subject, is limited to sixty years. In Ceylon, the Law of Prescription affecting the Crown is the Roman-Dutch Law, and under that law a person who has been in possession of land for a third of a century can maintain title to the same against the Crown [D. C., Colombo, 1,245, Vand. Rep. 83].

No laches imputable to the king.

Presumption, from possession, of grant from Crown.

This maxim applies also to criminal prosecutions which are brought in the name of the king, and therefore by the Common Law there is no limitation in treasons, felonies, or misdemeanours [3 Campb. 227, 7 East, 199].

Length of time barring prosecutions.

By the English Statute [7 William III., c. 7] an indictment for treason, except for an attempt to assassinate the king, must be found within three years after the commission of the treasonable act. But where the Legislature has fixed no limit, *Nullum tempus occurrit regi* holds true: thus a man may be convicted of murder at any distance of time within his life after the commission of the crime.

In Ceylon, by section 115 of Ordinance No. 11 of 1868, the right of prosecution for all offences except murder and treason was barred by twenty years from the time when the offence was committed, and now the Criminal Procedure Code provides [section 444] that the right of prosecution for murder or treason shall not be barred by any length of time, but the right of prosecution for any other crime or offence (save and except those as to which special provision is or shall be made by law) shall be barred by the lapse of twenty years from the time when the crime or offence shall have been committed.

No stain or corruption of blood in the Sovereign.

And, in judgment of law, he is never a minor.

(3) Perpetuity.
The king never dies.

In the king also can be no stain or corruption of blood; for if the heir to the Crown be attainted of treason or felony, and afterwards the Crown should descend to him, this would purge the attainder *ipso facto*. Neither can the king in judgment of law, as king, ever be a minor and under age; and therefore his royal grants and assents to Acts of Parliament are good, though he has not in his natural capacity attained the age of twenty-one [Bl. Com. 247].

(3) A third *attribute* of the King's Majesty is his *perpetuity*. The law ascribes to him, in his political capacity, an absolute immortality. The king never dies. For immediately upon the decease of the reigning prince in his natural capacity, his kingship or Imperial dignity, by act of law, without any *interregnum* or interval, is vested at once in his heir; who is, *eo instanti*, king to all intents and purposes. And so

tender is the law of supposing even a possibility of his death, that his natural dissolution is generally called his demise—*demissio regis, vel coronæ*, an expression which signifies merely a transfer of property [Bl. Com. 249].

II. Next, as to the king's authority. The King of England is not only the chief, but properly the sole, magistrate of the nation; all others acting by commission from, and in due subordination to, him. The prerogatives of the Crown regarding its royal *authority* have reference either to the nation's intercourse with *foreign* nations or its own *domestic* government and civil polity [Bl. 252].

With regard to foreign concerns, the king is the delegate or representative of his people. He has the sole power of sending ambassadors to Foreign States and receiving ambassadors at home [Bl. 253]; of making treaties, leagues, and alliances with Foreign States and Princes [Bl. 257]; of making war and peace [*Ibid*]; of issuing letters of marque* and reprisal [Bl. 258]; and of granting passports† or safe-conducts, without which, by the Law of Nations, no member of one society has a right to intrude into another [Bl. 259].

In connection with the power of the Crown to make treaties, the question arose in the case of *Walker v. Baird and another* [L. P. A. C. 1892, 491], whether the Crown had the power of compelling its subjects to

II.—His
authority
and power.

In foreign
affairs.
Sending and
receiving
ambassadors,
making
treaties,
issuing
letters of
marque,
granting
passports, &c.

Liability of
subjects to
obey
provisions of
treaties.
Walker v.
Baird and
another.

* These letters are grantable by the Law of Nations, whenever the subjects of one State are oppressed and injured by those of another; and justice is denied by that State to which the oppressor belongs. In this case letters of marque and reprisal (words used as synonymous and signifying, the latter, a taking in return, the former, the passing the frontiers in order to such taking) may be obtained, in order to seize the bodies or goods of the subjects of the offending State, until satisfaction be made, wherever they may be found.

† Governors of colonies are authorised to issue passports for foreign travel to persons naturalised in their respective colonies. These passports must be signed by the Governor, and must contain an express declaration that the person receiving the passport has been naturalised as a British subject in the Colony [C. O. L. Rules and Reg. Art. 404]. By Circular of the 23rd September, 1891, Governors have been informed that they are at liberty at their discretion to issue passports to British-born subjects.

obey the provisions of a treaty made either for the purpose of putting an end to war or to preserve peace, or, whether interference with private rights could be authorised otherwise than by the Legislature. In that case the Government of Newfoundland justified certain acts, in derogation of the private rights of the plaintiff in regard to his lobster fishery, as acts and matters of State arising out of political relations between Her Majesty and the French Government, contending that they involved the construction of treaties and of a temporary *modus vivendi* for lobster fishing in Newfoundland and other acts of State, and that they were matters which could not be inquired into by the court; and it was held that this disclosed no answer to the action.

As to the king's prerogatives in domestic affairs—He has the prerogative of rejecting such provisions in Parliament as he judges improper to be passed. Here it may be remarked that, as a general rule, although the king may avail himself of the provisions of any Acts of Parliament, he is not bound by such as do not particularly and expressly mention him.

Acts of
Parliament
binding upon
the Crown.

The most general words that can be devised—"any person or persons, bodies politic or corporate," &c.—affect not him in the least, if they may tend to restrain or diminish any of his rights or interests. But where an Act of Parliament is expressly made for the preservation of public rights and the suppression of public wrongs, or for the relief of the poor, the general advancement of learning, religion, and justice, or to prevent fraud or injury, and it does not interfere with the established rights of the Crown, it is said to be binding as well upon the king as upon the subject [Bl. 262 ; Ch. 382] ; and the Crown, though not named, is bound by the general words of statutes which tend to perform the will of a founder or donor [Ch. 383]. But Acts of Parliament which would divest or abridge

Acts not so
binding.

the king of his prerogatives, his interests, or his remedies, in the slightest degree, do not in general extend to or bind the king, unless there be express words to that effect [Vin. Ab. Statutes, E. 10; Bac. Ab. Prerog. E. 5]. Therefore, the statutes of limitation, bankruptcy, insolvency, set-off, &c., are irrelevant in the case of the king [Ch. 283]; nor does the statute of frauds* relate to him [29 Car. 2 c. 3; 1 Salk. 162].

Following these principles, it has been held that, in this Colony, the Crown is not bound by any Ordinance which does not particularly and expressly mention it, although it may, if it thinks fit, avail itself of the provisions of such Ordinance [D. C., Kandy, 21,663, Austin 129; Ram. for 1843-55, p. 47; D. C., Galle, 152; Ram. for 1843-55, p. 141]; that no prescription, under the local Acts, runs against the Crown [Morg. J. 3]; that the Crown is not bound by the Insolvency Ordinance [*Queen's Advocate v. Silva*, 9 S. C. C. 78]; and that by section 34 of Ordinance No. 16 of 1865 the Crown is not divested of its prerogative of immunity from taxation [*Horsfall v. the Queen's Advocate*, 5 S. C. C. 101; Wendt, 144].

The king is considered, in the next place, as the generalissimo, or the first in the military command within the kingdom. In this capacity he has the sole power of regulating fleets and armies; of erecting, manning, and governing forts and other places of strength within the realm; of appointing ports and havens or such places only, for persons and merchandise to pass into and out of the realm, as he in his wisdom sees proper; of ascertaining the limits of all ports and assigning proper wharfs and quays in each port for the exclusive landing and loading of

King is
generalissimo
in military
and naval
affairs.

* This doctrine as to the statute of frauds is doubted by Lord Hardwicke [3 Atk. 154].

merchandise; of erecting beacons, lighthouses, and sea-marks; of prohibiting the exportation of arms or ammunition out of the kingdom; of confining his subjects, when he sees proper, to stay within the realm by the writ of *ne exeat regnum*; or of recalling them when beyond the seas* [Bl. I. 262 *et pass.*].

The king as
the fountain
of justice.

Another capacity in which the king is considered in domestic affairs is as the *fountain of justice* and general conservator of the peace of the kingdom. By the fountain of justice the law does not mean the *author* or *original*, but only the *distributor*. He therefore has alone the right of erecting courts of judicature, and hence all jurisdictions of courts are either mediately or immediately derived from the Crown, their proceedings run generally in the king's name, they pass under his Seal, and are executed by his officers. To the branch of the prerogative we are considering attaches also the right of the Crown to pardon offences [Bl. I. 266 *et pass.*]. The power of the Crown to pardon a forfeiture and to grant restitution can, however, only be exercised where things remain *in statu quo*, but not so as to affect legal rights vested in third persons [*Rex v. Amery*, 2 Term. Rep. 569].

Right of
Crown to
pardon
offences.

This prerogative of pardon extends to the remission of a sentence of a purely punitive character for contempt of court [In re *A Special Reference from the Bahama Islands* (1893), A. C. 138].

Effect of
king's
pardon.

The king's pardon, if general in its purport and sufficient in other respects, obliterates every stain which the law attached to the offender. Generally speaking, it puts him in the same situation as that in which he stood before he committed the pardoned offence; and frees him from the penalties and forfeitures to which the law subjected his person and property [Bl. IV. 402]. Though a pardon cannot wash away

* The exercise of this prerogative has long been distised.

those doubts with which the evidence of one who has committed a serious offence will be received, yet, in point of law, a legal pardon impliedly removes the stigma and restores a man to credit; and it so far makes him a new man as to entitle him, according to some old authorities, to bring an action against any one who scandalises him in respect of the crime pardoned [Ch. 102]. When the offender's property and civil rights have once vested in the king, they cannot be restored to the offender, nor are they divested from the king by a mere pardon without a clause of restitution. It seems, however, that a clause of release of all judgments and executions in a general pardon extends to debts due to the king by forfeiture, and extinguishes or merges the debt in the hands of the debtor [1 Saund. 362; 2 B. & Ald. 277, *per* Abbott, C. J.; Ch. 102].

A consequence of the prerogative we are considering is the legal *ubiquity* of the king. In the eye of the law he is always present in all his courts, though he cannot personally distribute justice. His judges are the mirror by which the king's image is reflected. It is the regal office and not the royal person that is always present in the court, always ready to undertake prosecutions or pronounce judgment for the benefit and protection of the subject. And from this ubiquity it follows that the king can never be a nonsuit; for a nonsuit is a desertion of the suit or action by the non-appearance of the plaintiff in court. For the same reason also, in the forms of legal proceedings, the king is not said to appear by his attorney, as other men do; for in contemplation of law he is always present in court [Bl. I. 270].

The legal ubiquity of the king.

From the same prerogative may also be deduced the power of issuing Proclamations which is vested in the king alone. These Proclamations have a binding force, when they are grounded upon and enforce the laws of the realm [Bl. I. 270].

Power of Crown to issue Proclamations.

The king as
the fountain
of honour.
&c.

Creation of
new offices.

Naturaliza-
tion of aliens.

Issuing
Letters
Patent.

Erecting
corporations.

The king is likewise the *fountain of honour, of office, and of privilege*; and this in a different sense from that wherein he is styled the fountain of justice, for here he is really the parent of them. And therefore all degrees of nobility, of knighthood, and other titles, are received by immediate grant from the Crown, either expressed in writing, by writs or Letters Patent, as in the erection of peers and baronets, or by corporeal investiture, as in the creation of a simple knight. From the same principle also arises the prerogative of erecting and disposing of offices. As the king may create new titles, so may he create new offices, but with this restriction, that he cannot create new offices with new fees annexed to them, nor annex new fees to old offices, for this would be a tax upon the subject which cannot be imposed but by Act of Parliament. Upon the same, or a like reason, the king has also the prerogative of conferring privileges upon private persons, such as granting place or precedence to any of his subjects, as shall seem good to his royal wisdom, or such as converting aliens or persons born out of the king's dominions into denizens, whereby some very considerable privileges are conferred upon them.* Such also is the privilege of issuing patent rights or Letters Patent† for the exclusive use of an invention and of erecting corporations whereby a number of private persons are united and knit together, and enjoy many liberties, powers, and immunities in their political

* The naturalization of aliens in the colonies is now effected under authority of the Naturalization Acts, 1870 (33 Vict. cap. 14—see especially section 16—and 33 and 34 Vict. cap. 102), which empower the Legislature of every colony to confer on aliens by law all or any of the privileges of naturalization within such colony. When any measure for such a purpose is proposed, the Governor should

take care that words are inserted in the statute confining such privileges to the limits of the colony [C. O. L. for 1898, p. 354, Art. 403].

† The Crown is not bound by Letters Patent, and may not only manufacture the article which is the subject of the letters, but sell the same to other persons [*Jackson v. Davies*, 8 S. C. C. 145].

capacity which they were utterly incapable of in their natural [Bl. I. 271 *et pass.*].

Another light in which the Laws of England consider the king with regard to domestic concerns is as the arbiter of commerce—that is, domestic commerce. Under this head fall the prerogatives of the king to establish public marts or places for buying and selling, such as markets and fairs, with the tolls thereunto belonging; to regulate weights and measures; and to coin money and give it authority and make it current; and also to legitimate foreign coin and make it current in his realm, and to decry or cry down any coin of the kingdom, and make it no longer current [Bl. I. 273 *et pass.*].

The king as
the arbiter
of commerce.

The king is, lastly, considered by the Laws of England as the head and supreme governor of the National Church [Bl. I. 279].

The king as
head of the
National
Church.

The above, as stated already, are those branches of the king's prerogative which contribute to his royal dignity, and constitute the executive power of the Government. There remain to be examined the king's fiscal prerogatives or such as regard his *revenue*.

III. The
king's pre-
rogatives
regarding his
revenue.

This revenue is either ordinary or extraordinary. The ordinary revenue is such as has either subsisted time out of mind in the Crown, or else has been granted by Parliament by way of purchase or exchange for such of the Sovereign's inherent hereditary revenues as were found inconvenient to the subject [Bl. I. 281].

The ordinary
revenue.

Among the sources of Her Majesty's ordinary revenue in Ceylon may be mentioned the sale of Crown lands, fines imposed upon offenders, forfeitures of recognizances, and amercements levied upon defaulters, unclaimed shipwrecks, treasure-trove, &c.

Its chief
sources.

The extraordinary revenue of the Crown may be said to be that revenue derived by means of the new methods to which the Legislature is obliged to have recourse in order to supply the deficiencies of the

The extra-
ordinary
revenue.

Its chief
sources.

ordinary revenue and to meet the pecuniary demands of the public service [see Bl. I. 306]. The chief among the sources of this revenue in Ceylon are the Customs duties on imports and exports, the excise duty, the duty on salt, the stamp duties, and the proceeds of the Railway, Post Office, Pearl Fisheries, &c.

Some of the principal sources of the royal revenue, ordinary and extraordinary, will be dealt with more fully in another part of this work.

CHAPTER III.

THE COLONIAL GOVERNMENT AND THE
PUBLIC SERVICE.*Section I:—The Classification of Colonies.*

AS a view of the political classification of Colonies will help us to gain a correct idea of the form of Colonial Government applicable to Ceylon, I shall, as a preliminary to this chapter, describe concisely that classification, and further give a short history of the Colonial Office; considering the important part that that institution plays in the administration of the affairs of this Island:

British Colonies were at one time divided into three classes :—

Political
classification
of colonies.

(1) Crown Colonies, in which the Crown had the entire control of legislation, while the administration was carried on by public officers under the control of the Home Government.

(2) Colonies possessing representative institutions but not responsible Government, in which the Crown had no more than a veto on legislation, but the Home Government retained the control of public affairs.

(3) Colonies possessing representative institutions and responsible Government, in which the Crown had only a veto on legislation; and the Home Government had no control over any public officer except the Governor [R. & R.* Art. 1].

[Ceylon fell within the second of these classes.]

This classification is largely obsolete.

* The reference here and in the following pages is to the Revised Rules and Regulations

for Her Majesty's Colonial Service as published in the Colonial Office List for 1898:

At the present time the British Colonial Empire comprises forty distinct and independent governments; but in addition to these organised communities, there are a number of scattered dependencies under the dominion or protection of the Queen which do not possess regularly formed administrations.

Of these forty administrations eleven have elected assemblies and responsible governments; the constitutional position of the other twenty-nine is as follows [C. O. L. for 1898, p. 18] :—

(i.) No Legislative Council. Legislative power delegated to the Officer administering the Government.

(a) Crown has reserved power of legislating by Order in Council :— Gibraltar, Labuan, St. Helena.

(b) No general power reserved of legislating by Order in Council :— Basuto Land.

(ii.) Legislative Council nominated by the Crown.

(a) Crown has reserved power of legislating by Order in Council :— British New Guinea, Ceylon, Falklands, Fiji, Gambia, Gold Coast, Grenada, Hongkong, Lagos, St. Lucia, St. Vincent, Seychelles, Sierra Leone, Trinidad and Tobago, Turks Islands.

(b) No general power reserved of legislating by Order in Council :— British Honduras.

(iii.) Legislative Council partly elected.

(a) Crown has reserved power of legislating by Order in Council :— British Guiana, Malta, Mauritius (including Seychelles).

(b) No general power reserved of legislating by Order in Council :— Bahamas, Barbados, Bermuda, Jamaica, Leeward Islands.

Cyprus, which is not a British possession, has a Council of the Class 3.

Section II.—The Colonial Office.

*The first separate organisation in England for the central administration of Colonial affairs was a Committee of the Privy Council appointed by Order in Council of 4th July, 1660, "for the Plantations." On the 1st December, 1660, a separate "Council of Foreign Plantations" was created by Letters Patent.

Committee of
Privy Council
for the
Plantations.

Council of
Foreign
Plantations.

It may be interesting to state that on the 28th of February, 1671, Evelyn's Diary records the author's appointment as a Member of this Council, with "a salary of £500 per annum to encourage me."

In September, 1672, the Council was united, by Letters Patent, to the Council of Trade, and was henceforward known as the "Council of Trade and Plantations." It was suppressed on 21st December, 1677, and its functions, which had been much neglected, were transferred to the Privy Council. It was re-constituted in 1695, and continued to exist until 1782, at which date it consisted of eight Members of Parliament, who received a salary of £1,000 per annum each.

Council of
Trade and
Plantations.

The affairs of India were placed under its charge in 1748, and remained so until the establishment of the Board of Control in 1784. From 1768 the Colonial affairs have been dealt with by a Secretary of State.

Board of
Control.

The office of Secretary to the Sovereign dates at least from the reign of Henry III. There was one Principal Secretary only (who was already called the Secretary of State) down to 1539, when a second was appointed. From 1708 to 1746 a third Secretaryship existed, dealing exclusively with Scotland.

Secretary of
State for the
Colonies.

In 1768 a Secretary of State for the American or Colonial Department was appointed, in addition to the two Principal Secretaries of State then existing; but the Commissions to the Council of Trade and Plantations continued to run as before. Both the Council and

* The C. O. L. for 1898, pp. 7, 8.

the new Secretary of State's Department were abolished in 1782 by Burke's Act, 22 George III., cap. 82, on the loss of the United States.

The
Plantations
Branch of
the Home
Department.

By this Act power was given to delegate to a Committee of the Privy Council all the functions hitherto exercised by the Council of Trade and Plantations, and by Order in Council of 11th September, 1782, circular instructions were sent to the Governors of the Plantations to transmit their returns and accounts to the Privy Council. Pending the appointment of a Committee, Colonial affairs were dealt with by a subordinate branch of the Home Department, styled the Plantations Branch.

At this time the duties of the two Principal Secretaries of State were divided into "Home" and "Foreign," the affairs of Ireland devolving on the Home Department, which now undertook also those of the Colonies.

Committee for
Trade and
Foreign
Plantations.

In 1784, by Order in Council of 5th March, a "Committee for Trade and Foreign Plantations" was appointed in pursuance of Burke's Act, and the new body was reorganised and placed upon a definite footing by the subsequent Orders of 22nd August and 25th August, 1786. The business hitherto dealt with by the Plantations Branch of the Home Office was transferred to this Committee.

Secretary of
State for the
War and
Colonial
Department.

At its commencement in 1793 the affairs of the French war were managed by the Home Department, but in 1794 Mr. Dundas (afterwards Lord Melville), who was then the Secretary of State dealing with the Home affairs of the Department, was appointed "Secretary for War," and also nominally Secretary of State for the Colonies; but the Departments of War and the Colonies were not actually united until 1801, when Lord Hobart was created Secretary of State for the War and Colonial Department. From 1794 the "Committee for Trade and Foreign Plantations" (now known as the

Board of Trade) gradually ceased to have any connection with Colonial affairs. Board of Trade.

In 1854 a fourth Principal Secretaryship of State was created—the Secretaryship for War; and the affairs of the Colonies have since constituted the entire charge of a Principal Secretary of State. The office of Parliamentary Under Secretary was constituted in 1810, and, with the exception of seven years 1815–1822, has been continued ever since. An Assistant Under Secretary was appointed in 1847, and a Legal Adviser was added in 1867, and made an Assistant Under Secretary in 1870. Parliamentary Under Secretary.

A third Assistant Under Secretary was appointed in 1874. A new post, that of Assistant to the Legal Assistant Under Secretary, was created in 1897. The new offices in Downing street were occupied in 1876. Assistant Under Secretary, &c.

The Under Secretaries, Assistant Under Secretaries, and Assistant to the Legal Assistant Under Secretary are staff officers selected by the Secretary of State. The Clerical Staff is recruited after competitive examinations held by the Civil Service Commissioners. The Clerical Staff.

Section III.—The Governor.

The Governor is appointed by Her Majesty's Commission under the Royal Sign Manual and Signet. His appointment lasts during Her Majesty's pleasure, but his tenure of office is, as a rule, confined to a period of five years from the assumption of his duties. Duration of tenure of office.

Every person appointed to fill the office of Governor, Lieutenant-Governor, or to administer the Government of the Island, must, with all due solemnity, before entering on any of the duties of his office, cause the Commission appointing him to be read and published in the presence of the Chief Justice, or of some other Judge of the Supreme Court, and of such members of the Executive Council as can conveniently attend, which being done he should then and there take before them the oath of allegiance in the form provided by the Preliminaries to entering on duties of office.

Imperial Act 31 and 32 Vict. c. 72; and likewise the usual oaths for the due execution of the office of Governor and for the due and impartial administration of justice. The Chief Justice or other Judge as aforesaid, or, if they be unavoidably absent, the Senior Member of the Executive Council then present, is required to administer these oaths [Roy. Instr. of the 6th December, 1889].

How
Governor and
Commander-
in-Chief is to
be appointed.

By Letters Patent of the 16th June, 1877, issued for the purpose of making "effectual and permanent provision for the office of Governor and Commander-in-Chief" without making new Letters Patent on each demise of the said office, it was declared that there should be a Governor and Commander-in-Chief in and over the Island of Ceylon, and that the person who should fill this office be from time to time appointed under the Royal Sign Manual and Signet.

When Letters
Patent take
effect in the
Colony.

Letters Patent do not take effect in the Colony until published here, and appointments by Letters Patent become void unless so published within a specified period [26 and 27 Vict. c. 76; see R. & R. Art. 8].

How long
they
continue.

Patents, Commissions, or other authorities for the exercise of offices in the Colony held during pleasure continue in force until the expiration of eighteen months from the demise of the Crown [1 Will. IV. c. section 4, 2; see R. & R. Art. 9; see also *Devine v. Holloway*, 14, Moo. P. C. C. 298].

Command of
the regular
troops.

The Governor of a Colony, though bearing the title of Captain-General or Commander-in-Chief, is not, without special appointment from Her Majesty, invested with the command of Her Majesty's regular forces in the Colony. He is not therefore entitled to receive the allowances annexed to that command, or to take the immediate direction of any military operations, or, except in case of urgent necessity, to communicate officially with subordinate military officers, without the concurrence of the Officer in

Command of the Forces. Any such exceptional communication must be immediately notified to that officer [R. & R. Art. 10].

In the event of the Colony being invaded or assailed by a foreign enemy and becoming the scene of active military operations, the Officer in Command of Her Majesty's Land Forces must assume the entire military authority over the troops [R. & R. Art. 11].

Command in
the event of
foreign
invasion.

In the event of armed insurrection occurring within the Colony, or of such general disturbances arising as to render military operations necessary, it is the duty of the Governor to determine the objects with which, and the extent to which, Her Majesty's troops are to be employed in their suppression. He has, therefore, to issue to the Officer in Command of the Forces instructions as definite as possible on these points. When military operations have been determined upon, and their object and scope have been definitely decided, the responsibility for all details of their conduct rests solely with the Officer Commanding the Troops [R. & R. Art. 11a].

Armed
insurrection
within the
Colony.

Except in the case of invasion or assault by a foreign enemy, or of the Colony becoming the scene of military operations, it is the duty of the Governor to determine the objects with which, and the extent to which, Her Majesty's troops are to be employed. He will therefore issue to the Officer in Command of the Forces directions respecting their distribution and their employment on escort and other duties required for the safety and welfare of the Colony [R. & R. Art. 12].

Employment
of Her
Majesty's
troops.

In all the matters referred to in the two last preceding regulations the Governor will consult, as far as possible, with the Officer in Command, and will incur special responsibility if he shall direct the troops to be stationed or employed in a manner which that officer may consider open to military objection [R. & R. Art. 12a].

The Governor, as the Queen's Representative, will give the "word" in all places within his Government [R. & R. Art. 13].

Determina-
tion of
military
details.

On the other hand, the Officer in Command of the Forces will determine all military details respecting the distribution and movement of the troops and the composition of the different detachments, taking care that they are in conformity with the general directions issued to him by the Governor [R. & R. Art. 14].

Duties of
Officer in
Command of
Her Majesty's
Land Forces.

The Officer in Command of Her Majesty's Land Forces is alone charged with the superintendence of all details connected with the Military Department in the Colony, the regimental duty and discipline of the troops, inspections, and summoning and holding courts-martial, garrison or regimental, and the granting leave of absence to subordinate military officers [R. & R. Art. 15].

Sentences of
courts-
martial.

He carries into execution, on his own authority, the sentences of courts-martial, excepting sentences of death, which must first be approved, on behalf of the Queen, by the Officer administering the Civil Government [R. & R. Art. 16].

He makes to the Officer administering the Civil Government returns of the state and condition of the troops of the Military Departments, of the stores, magazines, and fortifications within the Colony, and furnishes duplicates of all such returns of this nature as he may be required or may see occasion to send to the Military authorities in England, or to any officer under whose general command he is placed [R. & R. Art. 17].

On the receipt of the Army (Annual) Act, the Officer in Command of Her Majesty's Land Forces communicates to the Civil authorities the "General Orders" in which it may be promulgated [R. & R. Art. 18].

The above regulations will hold good, although the Governor may be a Military Officer senior in rank to

the Officer in Command of the Forces [R. & R. Art. 19].

The powers of every Officer administering a Colonial Government are conferred, and his duties for the most part defined, in Her Majesty's Commission and the Instructions with which he is furnished [R. & R. Art. 22].

Her Majesty's Commission. Powers and duties of the Governor.

The Governor is empowered to keep and use the Public Seal of the Island for sealing all things whatsoever that should pass the said Seal [Let. Pat. of 16th June, 1877, section 4].

Public Seal.

He is empowered to make and execute in the name and on behalf of the Crown, under the Public Seal, grants and dispositions of lands which may lawfully be granted or disposed of by the Crown within this Island, either in conformity with instructions under the Royal Sign Manual and Signet, or in conformity with such regulations as may be made by him, with the advice of the Executive Council, and duly published in the Island [Let. Pat. of 16th June, 1877, section 5].

Grants of land.

Before disposing of any vacant or waste land belonging to the Crown, the Governor should cause the same to be surveyed, and such reservations to be made thereout as he may think necessary for roads or other public purposes. The Governor should not, directly or indirectly, purchase for himself any such land without the special permission of Her Majesty given through one of her Principal Secretaries of State [Roy. Instr. of 6th December, 1889, para. 30].

Waste land.

The Governor is empowered to constitute and appoint all such Judges, Commissioners of Oyer and Terminer, Justices of the Peace, and other necessary officers and ministers as may lawfully be appointed by the Crown, all of whom are to hold their offices during its pleasure [Let. Pat. of 16th June, 1877, section 6].

Judges, Commissioners, Justices of the Peace, &c.

He is empowered, when any crime has been committed within the Island, or for which the offender may

Pardon to accomplices in crime.

Pardon to
convicted
offenders.

be tried here, to grant, in the name of the Crown, a pardon to any accomplice not being the actual perpetrator of such crime, who gives such information as may lead to the conviction of the principal offender. He may further grant to any offender convicted of any crime in any court, or before any Judge, Justice, or Magistrate within the Island, a pardon, either free or subject to lawful conditions, or any respite of the execution of the sentence of any such offender for such period as to him may seem fit; and may remit any fines, penalties, or forfeitures which may become due and payable to the Crown. He should not, however, in any case, except when the offence is of a political nature, unaccompanied by any other grave crime, make it a condition of any pardon or remission of sentence that the offender should be banished from or should absent himself from the Island [Let. Pat. of 16th June, 1877, section 7].

Suspension
of public
officers.

He is empowered to suspend from the exercise of his office within the Island, upon sufficient cause to him appearing, any person exercising any office under or by virtue of any Commission or Warrant granted by the Crown or under its authority. The suspension is to have effect only until the pleasure of the Crown with reference to it is made known to the Governor. In proceeding to suspension, he is, however, to observe strictly the special instructions in that behalf [Let. Pat. of 16th June, 1877, section 8].

Pardon to
offenders
under
sentence of
court-martial.

The Governor may pardon persons imprisoned in the Island under sentence of a court-martial; but this is not to be done without consulting the Officer in Command of the Forces [R. & R. Art. 24].

Moneys for
the public
service.

The moneys to be expended for the public service are issued under the Governor's warrant, as the law in each particular case directs [R. & R. Art. 26].

Convoking or
proroguing of
Council.

He has the power, in the Queen's name, of convoking or proroguing the Legislative Council [R. & R. Art. 28].

He confers appointments to offices within the Colony, either absolute, where warranted by local laws, or temporary and provisional, until a reference has been made to Her Majesty's Government [R. & R. Art. 29].

Appointments to offices.

He may, whenever he thinks fit, require any person in the public service of the Island to take the oath of allegiance in the form prescribed by the Imperial Act, 31 and 32 Vict. c. 72, together with such other oath or oaths as may from time to time be prescribed by any laws in force in the Island [Roy. Instr. 6th Dec., 1889. See Ordinance No. 7 of 1869 as to oaths by public officers in Ceylon].

Oath of allegiance by public officer.

He has the power of granting or withholding his assent to any Bills which may be passed by the Legislative Council [R. & R. Art. 32].

Assent to Bills.

But he is required, in various cases, by his Instructions, to reserve such Bills for the Royal assent, or to assent to them only with a clause suspending their operation until they are confirmed by the Crown. These cases comprise, generally speaking, matters touching the currency, the Army and Navy, differential duties, the effect of foreign treaties, and any enactments of an unusual nature touching the prerogative or the rights of Her Majesty's subjects not resident in the Colony [R. & R. Art. 33].*

If anything should happen which may be for the advantage or security of the Colony, and is not provided for in the Governor's Commission and Instructions, he may take order for the present therein [R. & R. Art. 34].

Matters not provided for in Commission or Instructions.

He is not to declare or make war against any Foreign State, or against the subjects of any Foreign State. Aggression he must at all times repel to the best of his ability; and he is to use his best endeavours for the suppression of piracy [R. & R. Art. 35; *vide per* Willes,

Declaration of war against Foreign State, piracy, &c.

* See section 4.

J., in *Phillips v. Eyre*, L. R. 6, Q. B., 15, as to the duty of a Governor in case of a rebellion].

Discipline of
militia.

His attention is at all times to be directed to the state of discipline and equipment of Militia and Volunteers in the Colony, and when either force may be embodied he should send home monthly returns with a particular account of their arms and accoutrements [R. & R. Art. 36].

Periodical reports on this subject, which may not call for immediate attention, may be included in the annual "Blue Book" [R. & R. Art. 37].

"Blue Book."

The Governor should punctually transmit to Her Majesty, from year to year, through one of Her Principal Secretaries of State, the Annual Books of Returns for the Island, commonly called the "Blue Book," relating to the Revenue and Expenditure, Militia, Public Works, Legislation, Pensions, Population, Schools, Course of Exchange, Imports and Exports, Agricultural Produce, Manufactures, and other matters in the said Blue Book more particularly specified, with reference to the state and condition of the Island [Roy. Instr. 6th Dec., 1889, para. 34].

Leave of
absence.

The Governor should not, upon any pretence whatever, quit the Island without having first obtained leave from Her Majesty, for so doing, under the Royal Sign Manual and Signet, or through one of Her Principal Secretaries of State [R. & R. Art. 38; Roy. Instr. 6th Dec., 1889, para. 35].

Presents, &c.,
from
inhabitants.

He is prohibited from receiving presents, pecuniary or valuable, from the inhabitants of the Colony, or any class of them, during the continuance of his office, and from giving such presents; and this rule is to be equally observed on leaving his office [R. & R. Art. 39].

In cases where money has been subscribed with a view of marking public approbation of the Governor's conduct, it may be dedicated to objects of general utility and connected with the name of the person

who has merited such a proof of the general esteem [R. & R. Art. 40].

He is not, without special permission, to forward any articles for presentation to Her Majesty [R. & R. Art. 41].

Articles of presentation to Her Majesty.

In the event of the death, incapacity, removal, or absence of the Governor from the Island, his powers and authorities vest in the Lieutenant-Governor. If there be no Lieutenant-Governor in the Island, then in such person or persons as may be appointed by the Crown under its Sign Manual and Signet to administer the Government of the Island; and if there be no such person or persons within the Island so appointed, then in the Senior Officer for the time being in Command of Her Majesty's Regular Troops in the Island [Let. Pat. of 16th June, 1877, section 9].

Death, removal, &c., of Governor.

By the Interpretation Act, 1889 [52 and 53 Vict. c. 63, section 18], the expression "Governor" in that and every subsequent Act is, as respects any British possession other than Canada and India, to include the Officer for the time being administering the Government of that possession.

Meaning of expression "Governor."

The authority of the Queen in the Colony is represented by the Governor [see 12 and 13 Vict. c. 96, section 5; 26 and 27 Vict. c. 84, section 1]. He cannot, however, in ordinary cases, be regarded as a Viceroy, nor can it be assumed that he possesses general Sovereign power. His authority is derived from his Commission, and limited to the powers thereby expressly or impliedly entrusted to him [see *Musgrave v. Pulido*, 5 App. Cas. 111]. His assumption, therefore, of an act of Sovereign power out of the limits of his authority is purely void, and the courts of the Island could not give it any legal effect [see *Cameron v. Kyte*, 3 Knapp 332].

Assumption by Governor of Sovereign power out of limits of authority.

The Governor, it may here be mentioned, is entitled to the bounties payable in respect of a seizure of slaves,

Bounties in respect of

seizure of
slaves.

even though he is absent from the Colony at the time of the seizure [see *In re seizure of Slaves at Sierra Leone*, Br. & Lush. Adm. R. 148 ; 32 L. J. Adm. 189].

Naturaliza-
tion of aliens.

The jurisdiction conferred by the Naturalization Act of 1870 [33 and 34 Vict. c. 14] on the Secretary of State in the United Kingdom, in respect of the grant of a certificate of re-admission to British nationality, may be exercised, in the case of any statutory alien being in the Island, by the Governor ; and residence in the Island is, in the case of such person, to be deemed equivalent to residence in the United Kingdom [see 33 and 34 Vict. c. 14, section 8].

Extradition
of criminals.

The Extradition Acts of 1870 and 1873 [33 and 34 Vict. c. 52, section 17 ; 36 and 37 Vict. c. 60, section 1] extend to the Colonies. The requisition by a Foreign State for the surrender of a fugitive criminal in the Colony may be made to the Governor, in whom are vested all the powers and authorities in relation to the surrender exercisable by a Police Magistrate or by a Secretary of State in England [33 and 34 Vict. c. 52, section 17]. Under the Fugitive Offenders' Act [44 and 45 Vict. c. 69] also, which creates an inter-colonial system of extradition, the Governor of a Colony is empowered to endorse warrants issued in other parts of Her Majesty's dominions for the apprehension of fugitives in his Colony ; and to order, by warrant under his hand, the return of such a fugitive on the expiration of fifteen days after his committal to prison by a Magistrate, or after the final decision of a Superior Court on a writ of *Habeas corpus* or otherlike process with reference to the fugitive, to the part of her Majesty's dominions from which he is a fugitive, to be dealt with there in due course of law.

Trial of
aliens for
Admiralty
offences.

The power to grant leave to institute in Ceylon proceedings for the trial and punishment of a person, not a subject of Her Majesty, charged with any offence declared by the Territorial Waters Jurisdiction Act [41

and 42 Vict. c. 73] to be within the jurisdiction of the Admiral, is by that Act vested in the Governor. Production of a document at the trial purporting to be signed by the Governor, and containing such consent and a certificate that it is expedient that such proceedings should be instituted, is sufficient evidence of the consent and certificate for all purposes of the Act.

Her Majesty may, by Order in Council, vest any fortifications, works, buildings, or land in the Colony, held in trust for the defence of the Colony, in the Governor, on a representation of a Secretary of State and of the Commissioners of the Treasury that it is expedient so to do [40 and 41 Vict. c. 23, section 1].

Fortifications,
&c., in the
Colony.

The Governor may authorise persons to attest soldiers' wills [44 and 45 Vict. c. 58, section 94, sub-section 1]. He has power to confirm the findings of court-martial in the Island [section 54, sub-sections 4 and 7].

Authority
to attest
soldiers'
wills.

He must also approve of sentences of death passed by court-martial in the Colony [section 54, sub-section 7], and of sentences of penal servitude so passed on conviction of manslaughter or rape, or any other civil offence under the section of the Act relating to the trial by court-martial of civil offences [section 54, sub-section 9]. He has also to arrange for the reception in prison in the Colony of military prisoners, deserters, and absentees without leave [sections 131, 132]. He may also by Proclamation declare the forces in the Colony temporarily subject to the Army Act [section 189, sub-sections 2, 3, 4].

Approval of
sentences on
criminals
and imprison-
ment of
military
prisoners.

In the event of a vacancy in the office of judge, registrar, marshal, or other officer of the Vice-Admiralty Court of Ceylon, the Governor may appoint a fit person to fill the vacancy until an appointment is made by the Admiralty [see 53 and 54 Vict. c. 27, section 9].

Vacancy
in Vice-
Admiralty
Court.

The Governor is empowered to issue Proclamations declaring what, for the purposes of the Passenger Act, 1855 [18 and 19 Vict. c. 119], shall be deemed to be the

Regulation
of voyage and
equipments
of passenger
ships.

length of the voyage of a passenger ship from the Colony to any other place, and prescribing the scale of diet and the necessary medicines and medical instruments, &c. The requirements of such Proclamations are to be enforced in all Her Majesty's dominions as if incorporated in the Act; and copies purporting to be under the hand of the Governor and under the Public Seal of the Colony are to be received in evidence unless proved not to be genuine [section 97]. The Governor is also empowered to appoint surveyors and medical practitioners on board passenger ships proceeding on Colonial voyages [section 98]. He may also defray the expenses of passengers picked up at sea and conveyed to their respective Colonies [section 52]. He is also to authorise the officer who sues for penalties and forfeiture under the Act [section 84].

Prosecution
of unsea-
worthy ships.

Prosecutions of unseaworthy ships in Ceylon under the Merchant Shipping Act of 1876 [39 and 40 Vict. c. 80, section 4] can only be instituted by and with the consent of the Governor.

Distressed
seamen.

Distressed seamen may be relieved and sent home by him at the public expense [17 and 18 Vict. c. 104, section 211].

Certificates
of registry
of ships.

The Governor may, with the approval of the Secretary of State, make regulations for granting certificates of registry of ships not exceeding sixty tons burden, terminable at the end of six months [31 and 32 Vict. c. 129, section 1]. He may also appoint surveyors to inspect crew spaces within the Island [section 3].

Powers vested
in Commis-
sioner of
Customs.

The powers and authorities vested in the Commissioners of Customs with regard to the Customs, or to trade and navigation, or the registry of ships or any interest therein in the Island, are vested in the Governor, Lieutenant-Governor, or other person administering the Government [39 and 40 Vict. c. 36, section 149; 17 and 18 Vict. c. 104, sections 30, 31]. He may also

approve ports of registry and appoint surveyors of British ships [50 and 51 Vict. c. 62, section 3.]

In *Cloete v. The Queen* [8 Moo. P. C. C. 484] and *Gahan v. Lafitte* [3 Moo. P. C. C. 382] the capricious and indiscreet exercise of their powers by Governors of Colonies was restrained by the Privy Council.

Capricious exercise of powers by Governors.

Provision is made for retiring pensions for Governors by 28 and 29 Vict. c. 113, amended by 35 and 36 Vict. c. 29.

Pensions of Governors.

The liability of the Governor to answer for his acts before the local courts of law may be conveniently discussed under two heads.

Liability of Governor to answer for his own acts.

(1) *Liability to Civil Actions.*

Here two questions arise in reference,—first, to the court in which the action may be brought; and secondly, to the nature of the cause of action.

In civil actions.

A Governor may be sued in the courts of his own Government [*Hill v. Bigge*, 3 Moo. P. C. C. 465; 5 App. Cas. 107]. In this case a Governor's freedom from arrest on civil process issued by the courts of his own Government was urged as an argument against his liability to be sued in those courts. Lord Brougham, however, pointed out that the liability to be taken in execution was not the necessary consequence of a person's liability to have a judgment against him, the privilege from legal process then still existing in certain persons not protecting them from suits. His Lordship held that a Governor does not ever represent the Sovereign generally, having only the functions delegated to him by the terms of his Commission, and being only the officer to execute the specific powers with which that Commission clothes him, and under the Commission usually issued by the Crown he cannot claim, as a personal privilege, exemption from liability to be sued in the courts of his Colony.

Hill v. Bigge.

On the other hand, in *Fabrigas v. Mostyn* [20 St. Tr. 81; 1 Cowp. 161], the question was, whether the

Fabrigas v. Mostyn.

Governor of a Colony could be sued in England for acts committed in his Colony. It was argued on the defendant's behalf that the action could not be brought in an English Court against the defendant, he being the Governor of a Colony. Lord Mansfield held that the action did "most emphatically lie." His *dictum*, however, that the Governor is in the nature of a Viceroy, and that, therefore, during his Government no action, civil or criminal, will lie against him in the courts of his Government, was dissented from by Lord Brougham in *Hill v. Bigge* [3 Moo. P. C. C. 382] as not necessary to the decision.

Gleynn v.
Houston.

Gleynn v. Houston [2 M. & G. 337] was an action for assault and false imprisonment brought in the Common Pleas at Westminster against the Lieutenant-Governor of Gibraltar by a British merchant resident there. On motion for a new trial the only question argued was whether the evidence was sufficient to warrant the verdict, the liability of the defendant in that court not being disputed [see also *Campbell v. Hall* 20 St. Tr. 239; *Bryan v. Arthur*, 11 A. & E. 108; *Smith v. Nicholls*, 5 Bing. N. C. 208].

Wall v.
Macnamara.

In *Wall v. Macnamara* [1 T. R. 536], which was an action against the Governor of Senegambia for false imprisonment, the principle on which should be tried the legality of acts done in the exercise of their duty by military officers in the colonies was discussed.

Secondly, as to the nature of the cause of action. The cases already cited sufficiently illustrate a Governor's liability for acts unconnected with his official capacity. The question whether he can be held liable for acts of State in his capacity of Governor has been raised, but has not yet received a direct answer in any of the courts. The tendency of the decisions, however, seems to be towards exempting Governors of Colonies from liability to answer in civil actions for acts of State in the courts both of their governments and of England.

In *Tandy v. The Earl of Westmoreland* [27 St. Tr. 1,246] and *Luby v. Lord Wodehouse* [17 Ir. C. L. R. 618] it was held that an action could not be brought in Ireland against the Lord-Lieutenant of Ireland for an act done in his political capacity. Both these cases were cited in the case of *Musgrave v. Pulido* [5 App. Cas. 111], and it was there remarked that in these cases the Lord-Lieutenant appears to have been regarded as a Viceroy. In both, the facts were brought before the court, and, in both, it appeared that the acts complained of were political acts done by the Lord-Lieutenant in his official capacity, and were assumed to be within the limits of the authority delegated to him by the Crown. The courts appear to have thought that, in these circumstances, no action would lie against the Lord-Lieutenant in Ireland; and upon the facts brought to their notice it may well be that no action would lie against him anywhere. In the same case occur the following remarks with reference to a Governor not being regarded as a Viceroy:—"If the Governor cannot claim exemption from being sued in the courts of the colony in which he holds that office, as a personal privilege, simply from his being Governor, and is obliged to go further, his plea must then show by proper and sufficient averments that the acts complained of were acts of State policy within the limits of his Commission, and were done by him as the servant of the Crown, so as to be, as they are sometimes shortly termed, acts of State. A plea, however, disclosing these facts would raise more than a question of personal exemption from being sued, and would afford an answer to the action not only in the courts of the colony, but in all courts Let it be granted that, for acts of power done by a Governor under and within the limits of his Commission, he is protected, because in doing them he is the servant of the Crown and is exercising its Sovereign authority; the like protection cannot be extended

Tandy v. The Earl of Westmoreland and Luby v. Lord Wodehouse.

Musgrave v. Pulido.

to acts which are wholly beyond the authority confided to him. Such acts, though the Governor may assume to do them as Governor, cannot be considered as done on behalf of the Crown, nor to be in any proper sense acts of State. When questions of this kind arise, it must necessarily be within the province of municipal courts to determine the true character of the acts done by the Governor, though it may be that, when it is established that the particular act in question is really an act of State policy done under the authority of the Crown, the defence is complete, and the courts can take no further cognizance of it."

Phillips v.
Eyre.

In *Phillips v. Eyre* [L. R. 4 Q. B. 225; 6 Q. B. 1] too there are *dicta* in favour of the non-liability of a Colonial Governor in civil actions for acts done in his political capacity.

In an action for libel by a Governor he cannot be compelled to produce copies of despatches, reports, and other communications that have passed between himself, as Governor, and Her Majesty's Secretary of State for the Colonies, or between himself, as Governor, and a Royal Commissioner appointed to inquire into the affairs of the Colony, or between the Secretary of State and that Commissioner, such documents having been acquired and held by him in his capacity of Governor of one of Her Majesty's colonies [*Hennessy v. Wright*, L. R. 21 Q. B. D. 509].

Service of
writ on a
Colonial
Government.

A Colonial Government is not a corporation, and cannot be effectually served with a writ, nor will an order for substituted service be made [*Sloman v. Governor and Government of New Zealand*, L. R. 1 C. P. D. 563].

(2.) *Liability to Criminal Proceedings for Acts committed in the Government.*

Liability of
Governor to

The Act known as the Governors' Act [11 and 12 Will. 3, c. 12] enacted that "if any Governor, Lieutenant-

Governor, or Commander-in-Chief of any Plantation or Colony within His Majesty's dominions beyond the seas shall.....be guilty of oppressing any of His Majesty's subjects beyond the seas within their respective commands, or shall be guilty of any other crime or offence contrary to the laws of this realm or in force within their respective Governments or commands, such oppressions, crimes, or offences shall be inquired of, heard, and determined in His Majesty's Court of King's Bench in England, or before such Commissioners and in such county as shall be assigned by His Majesty's Commission." This Act was extended by 42 Geo. III., c. 85, to all persons employed in His Majesty's service in any civil or military capacity out of Great Britain, guilty of any crime, misdemeanour, or offence in the execution or under colour or in the exercise of any such employment. This latter Act only provided for trial in the King's Bench in England, and not before Commissioners; and it has been held not to extend to felonies [*R. v. Shawe*, 5 M. & S. 403].

criminal
proceedings.

These two statutes of William III. and George IV. received discussion in *Queen v. Eyre* [3 Q. B. 487], where a *mandamus* to a metropolitan police magistrate was applied for, directing him to hear the evidence in certain charges preferred against the defendant, and to proceed therein according to law. The defendant had been Governor of Jamaica in 1865, and he having returned to England and being within the jurisdiction of the magistrate, application was made for warrants or summonses charging him with having, while Governor of Jamaica, illegally proclaimed martial law, and with certain other misdemeanours committed as Governor of the Island. On argument, the Queen's Bench decided that an offence under the statutes above mentioned was an offence committed on land beyond the seas, for which an indictment might legally be preferred in any place in England, within section 2 of

*Queen v.
Eyre.*

11 and 12 Vict. c. 42; that that section and the other enactments of the same statute, as to preliminary proceedings before any magistrate in whose jurisdiction the accused might be, applied to charges under the other two statutes; and that the Court of Queen's Bench, where the trial is by them directed to be had, was included in the term "next court of oyer and terminer" in section 20 of the statute of Victoria.

Section IV.—The Legislative Council.

"Council of Government."

By Letters Patent of the 23rd April, 1831, issued by King William IV., appointing Sir Robert John Wilmot Horton Governor of Ceylon, His Majesty declared his pleasure to be that there should be within the Island a "Council of Government" to be constituted in such manner as was directed in the General Instructions given to the Governor, and the Governor was given full power and authority, with the advice and consent of the said Council of Government, "to make oath, ordain, and establish laws for the order, peace, and good Government of the Island," subject to all such rules and regulations as were mentioned in those Letters Patent.

The Legislative and Executive Councils.

By Letters Patent of the 19th March, 1833, so much of the Letters Patent of the 23rd April, 1831, as related to the "Council of Government" was revoked, and His Majesty directed that there should be in the Island two separate Councils, one to be called the Legislative Council and the other the Executive, and that these Councils should be constituted in accordance with directions in the Instructions accompanying the Letters Patent, or according to such further powers, instructions, and authority as should at any future time be granted to the Governor under the Royal Signet and Sign Manual or by Order in Council or through one of the Principal Secretaries of State.

The Governor was further given full power and authority, with the advice and consent of the Legislative Council, "to make oath, ordain, and establish laws for the order, peace, and good government of the Island," subject to all such rules and regulations as were contained in the Instructions accompanying the Letters Patent of the 19th March, 1833.

Power to
make laws.

The right of the Crown, however, to disallow any laws made as aforesaid, and to make, from time to time, with the advice and consent of Parliament or with the advice of the Privy Council, all such laws as might seem necessary to the order, peace, and good Government of the Island, was specially reserved.

Right of
Crown to
disallow
laws.

By Letters Patent of the 16th June, 1877, it was declared that the Legislative and Executive Councils should be respectively constituted in such manner and of such persons as might be directed by the Instructions accompanying those Letters, or by any other Instructions which might, from time to time, be addressed to the Governor under the Royal Sign Manual and Signet or by Order in Council [see section 2]; and by the same Letters Patent [section 3] the Governor was authorised, with the advice and consent of the Legislative Council, to enact laws for the peace, order, and good government of the Island, subject to all such rules and regulations as might, from time to time, be issued under the Royal Sign Manual and Signet. The right of the Crown, however, to make, repeal, or amend laws, with the consent and advice of Parliament or with the advice of the Privy Council, was specially reserved.

Constitution
of the
Legislative
and Executive
Councils.

Enactment
of laws
by the
Legislative
Council.

Right of
Crown to
legislate for
the Island.

In terms of paragraph 13 of the Royal Instructions of the 6th December, 1889, the Legislative Council was to consist of Official and Unofficial Members. The Official Members were to be the Lieutenant-Governor, if any, of the Island, the Senior Officer for the time being in command of the Regular Troops, if not below the rank of Captain, and the persons for

Members
of the
Legislative
Council.

the time being lawfully discharging the functions of Colonial Secretary, Attorney-General, Auditor-General, Colonial Treasurer, Government Agent for the Western Province, Government Agent for the Central Province, Surveyor-General, and Collector of Customs at the Port of Colombo.

The Surveyor-General.

The person for the time being discharging the functions of Surveyor-General ceased to be a member of the Legislative Council from the date of the receipt of the Royal Instructions of the 22nd December, 1893, and Her Majesty thereby directed that the Official Members of the Council should consist of the other persons designated above and of such one other person holding office in the Island as Her Majesty might, from time to time, appoint by Instructions or Warrant under the Royal Sign Manual and Signet [para. 1].

Provisional appointments of Official Members.

If any person appointed as last aforesaid should die, become incapable, or be suspended or removed from his seat in the Council, or be absent from the Island, or if he should, with permission of the Governor, resign his seat by writing under his hand, the Governor may, by an Instrument under the Public Seal of the Island, appoint in his place a fit person holding office in the Island to be provisionally an Official Member of the Legislative Council [Roy. Instr. 22nd Dec., 1893, para. 2].

Such person forthwith ceased to be a member, if his appointment was disallowed by Her Majesty, or if the member in whose place he was appointed returned to the Island, or was released from suspension, or was declared by the Governor capable of again discharging his functions in the Council [Roy. Instr. 22nd Dec., 1893, para. 3].

The Governor should, without delay, report to Her Majesty, for her confirmation or disallowance, through one of her Principal Secretaries of State, every such provisional appointment. Every person so appointed

held his seat during the pleasure of the Crown, and it was open to the Governor, by any Instrument under the Public Seal of the Island, to revoke any such appointment [Roy. Instr. 22nd Dec., 1893, para. 4].

When the Senior Officer for the time being in Command of the Regular Troops is in the administration of the Government, his place in the Council is to be filled by the next Senior Officer, if not below the rank of Captain [Roy. Instr. 6th Dec., 1889, para. 13].

The Governor is empowered to appoint, from time to time, by any Instrument under the Public Seal of the Island, any fit person to be an Unofficial Member of the Legislative Council. The total number of the Unofficial Members resident in the Island, and capable of acting in the exercise of their offices, should at no time exceed the number of eight [Roy. Instr. 6th Dec., 1889, para. 14].

Under the Royal Instructions of the 6th December, 1889, paragraph 15, every person who at the date of their receipt in the Island was an Unofficial Member of the Legislative Council was to retain his seat until the end of three years from the date of such receipt, and every Unofficial Member appointed after such date was to vacate his seat at the end of three years from the date of the Instrument containing his appointment. Every such Unofficial Member was, however, to be eligible to be re-appointed by the Governor for the like period of three years.

By Royal Instructions of the 15th March, 1898, paragraph 15, the term of office of Unofficial Members was extended to five years.

If any Unofficial Member of the Legislative Council should become incapable of acting in the exercise of his office, or be absent from the Island, the Governor might, by an Instrument under the Public Seal, appoint in his place a fit person to be provisionally a member. Such person forthwith ceased to be a member, if his

Place in Council of Senior Officer in command of Regular Troops when he is in administration of Government. Unofficial Members.

Their term of office.

Provisional appointment of Unofficial Members.

appointment was disallowed by Her Majesty, or if the member in whose place he was appointed returned to the Island, or was declared by the Governor capable of again discharging his functions in the Council. [Roy. Instr. 6th Dec., 1889, para. 16].

Report of
appointment
of Unofficial
Members.

The Governor should, without delay, report to Her Majesty, for Her confirmation or disallowance, through one of Her Principal Secretaries of State, every appointment of any person as an Unofficial Member of the Legislative Council. Every such person holds his place in the Council during Her Majesty's pleasure, and the Governor is empowered to revoke, by any Instrument under the Public Seal, any such appointment [Roy. Instr. 6th Dec., 1889, para. 17].

Order of
precedence of
Members.

Under paragraph 18 of the Royal Instructions of the 6th December, 1889, the Official Members of the Legislative Council took precedence of the Unofficial Members, and the Official Members among themselves took precedence according to the order in which their respective offices were enumerated in those Instructions, except that the Senior Military Officer, if he was below the rank of Lieutenant-Colonel, took precedence next after the person lawfully discharging the functions of Attorney-General. The Unofficial Members took precedence according to the priority of their respective appointments, or if appointed by the same Instrument according to the order in which they were named therein.

By the Royal Instructions of the 15th March, 1898, it was ordered that every Unofficial Member re-appointed immediately on the termination of his term of office should take precedence according to the date of his first appointment to the Legislative Council.

Standing
Rules and
Orders.

The Legislative Council may, from time to time, make Standing Rules and Orders for the regulation of their own proceedings, provided that such Rules and Orders be not repugnant to Letters Patent or Royal Instructions

issued under the Sign Manual and Signet [Roy. Instr. 6th Dec., 1889, para. 19].

The Council cannot act in any case unless six members at the least, in addition to the Governor or to the member presiding, be present at and throughout a meeting [Roy. Instr. 6th Dec., 1889, para. 20].

Quorum of members.

It is the duty of the Governor to attend and preside in the Legislative Council, unless prevented by illness or other grave cause. In his absence the member who is first in precedence of those present is to preside [Roy. Instr. 6th Dec., 1889, para. 21].

President.

Questions proposed for debate are to be decided by the majority of votes. The Governor or the member presiding has an original vote in common with the other members of the Council, as also a casting vote, if upon any question the votes be equal [Roy. Instr. 6th Dec., 1889, para. 22].

How questions debated are to be decided.

Any member may propose a question for debate. Such question, if seconded by any other member, is debated and disposed of according to the Standing Rules and Orders. Every Ordinance, vote, resolution, or question, however, the object or effect of which is to dispose of or charge any part of the Island revenue, must be proposed by the Governor, unless the proposal of the same be expressly allowed or directed by him [Roy. Instr. 6th Dec., 1889, para. 23].

Who may propose questions of debate.

All laws enacted by the Legislative Council are to be styled "Ordinances," and the enacting words are to be, "Enacted by the Governor of Ceylon, with the advice and consent of the Legislative Council thereof." The Ordinances are to be distinguished by titles, and to be divided into successive clauses or paragraphs, numbered consecutively, and to every such clause is to be annexed in the margin a short summary of its contents. The Ordinances of each year are to be distinguished by consecutive numbers, commencing in each year with the number one [Roy. Instr. 6th Dec., 1889, para. 24].

How Legislative enactments are to be styled.

Different Ordinances for different matters.

Each different matter must be provided for by a different Ordinance, without intermixing into one and the same Ordinance such things as have no proper relation to one another; and no clause is to be inserted in or annexed to any Ordinance which may be foreign to what the title of such Ordinance imports; and no perpetual clause should be part of any temporary Ordinance [*Ibid.*].

To what Ordinances Governor should not assent.

Except in the case hereunder mentioned, the Governor should not assent, in Her Majesty's name, to any Ordinance of any of the following classes:—

- (1) For the divorce of persons joined together in holy matrimony.
- (2) For the grant of land or money, or other donation or gratuity, to himself.
- (3) For the increase or diminution in the number, salary, or allowances of the public officers.
- (4) Affecting the currency of the Island or relating to the issue of bank notes.
- (5) For establishing any Banking Association, or amending or altering the constitution, powers, or privileges of any Banking Association.
- (6) Imposing differential duties.
- (7) Any Ordinance the provisions of which may appear inconsistent with obligations imposed upon the Crown by Treaty.
- (8) Interfering with the discipline or control of Her Majesty's Forces by land or sea.
- (9) Any Ordinance of an extraordinary nature and importance, whereby Her Majesty's prerogative or the rights and property of the subjects not residing in the Island, or the trade and shipping of the United Kingdom and its Dependencies, may be prejudiced.
- (10) Subjecting or making liable persons not of European birth or descent to any disabilities or

Public Service.

restrictions to which persons of European birth or descent are not also subjected or made liable.

- (11) Any Ordinance containing provisions to which the Royal assent has been once refused, or which have been disallowed by the Queen—

unless such Ordinance contain a clause suspending the operation of such Ordinance until the signification in the Island of Her Majesty's pleasure thereupon, or unless the Governor satisfies himself that an urgent necessity exists requiring the bringing into immediate operation of such Ordinance. In this case the Governor may assent to it, unless it is repugnant to the Law of England or inconsistent with any obligations imposed upon the Crown by Treaty. He must, however, transmit to Her Majesty, by the earliest opportunity, any Ordinance so assented to, together with his reasons for assenting thereto [Roy. Instr. 6th Dec., 1889, para. 25].

Every law which has received the Governor's assent, unless it contains a suspending clause, comes into operation immediately or at the time specified in the law itself. But the Crown retains power to disallow the law; and if such power be exercised, the law ceases to have operation from the date at which such disallowance is published in the Colony [R. & R. Art. 50].

When local laws come into operation.

No private Ordinance whereby the property of any private person is affected should be passed unless there is in it a saving of the rights of the Crown, and of all bodies, politic and corporate, and of all other persons except such as are mentioned in the said Ordinance and those claiming by, from, and under them. The Governor should not assent to any private Ordinance until proof is made before him in the Legislative Council, and recorded in its minutes, that adequate and timely notification by public advertisement or otherwise was

Private Ordinances affecting private property of persons.

made of the parties' intention to apply for such private Ordinance before it was brought to the Legislative Council. A certificate under the hand of the Governor should be transmitted with and annexed to every such private Ordinance, signifying that such notification had been given, and declaring the manner of giving the same [Roy. Instr. 6th Dec., 1889, para. 26].

Transmission
of Ordinances
for Her
Majesty's
approval.

The Governor should transmit to Her Majesty through one of her Principal Secretaries of State, for her approval, disallowance, or other direction thereupon, a full and exact copy in duplicate of every passed Ordinance, and of the marginal summary thereof, duly authenticated under the Public Seal of the Island and by his own signature. Such copy should be accompanied by such explanatory observations as might be required to exhibit the reasons and occasion for passing such Ordinance [Roy. Instr. 6th Dec., 1889, para. 27].

Publication
of passed
Ordinances.

At the earliest practicable period at the commencement of each year the Governor should cause a complete collection of all Ordinances enacted during the preceding year to be published for general information [Roy. Instr. 6th Dec., 1889, para. 28].

Minutes of
proceedings
of Legislative
Council.

Minutes should be regularly kept of all the proceedings of the Legislative Council, and at each meeting the minutes of the last preceding meeting should be read over, and confirmed or amended as the case might require, before proceeding to the despatch of any other business. Twice in each year the Governor should transmit to Her Majesty, through one of Her Principal Secretaries of State, a full and exact copy of all minutes for the preceding half year [Roy. Instr. 6th Dec., 1889, para. 29].

"Colonial
Legislature."

The Governor and Legislative Council fall under the definition of "Colonial Legislature" given in 26 and 27 Vict. c. 84, section 1 [*c.f.* 32 and 33 Vict. c. 11, section 2], and "Colonial Law" as defined in 28 and 29 Vict. c. 63.

section 1, includes laws made for any Colony, either by its Legislature or by Her Majesty in Council. By the Interpretation Act, 1889 [52 and 53 Vict. c. 63, section 18], the expression "Legislature," when used with reference to a British possession, means the authority, other than the Imperial Parliament or Her Majesty in Council, competent to make laws for such possession.

A Colonial Legislature is not a delegate of the Imperial Legislature. It is a Legislature restricted in the area of its powers, but within that area unrestricted and not acting as an agent or a delegate [*Pavell v. Apollo Candle Co.*, 10 App. Cas. 282; *Hodge v. Reg.*, 9 App. Cas. 117; see also *Reg. v. Burah*, 3 App. Cas. 889].

The authority of the Governor and Legislative Council to make Laws and Ordinances is not determined by the demise of the Crown [see *Devine v. Holloway*, 14 Moo. P. C. C. 290].

The Legislature cannot make laws which will be binding over persons beyond the limits of the Island [see *Macleod v. Attorney-General for New South Wales*, (1891) A. C. 455, 458]; but a law made for the purpose of establishing the validity of marriages contracted in Ceylon is valid in all parts of Her Majesty's dominions, provided that the parties to the marriage were, according to the Law of England, competent to contract the same at the time of the marriage [28 and 29 Vict. c. 64].

No law passed by the Legislative Council, with the concurrence of or assented to by the Governor, is to be deemed to be void or inoperative by reason only of its being contrary to any Instructions with reference to such law or the subject thereof, which may have been given to the Governor by or on behalf of Her Majesty by any Instrument authorising him to concur in passing or to assent to laws of peace, order, and good

Effect of
demise of
Crown on
authority of
Legislative
Council to
make laws.

Laws binding
outside the
Colony.

Laws
contrary
to Royal
Instructions.

Government of the Colony. [28 and 29 Vict. c. 63, section 4].

Laws for
imparting
privileges of
naturaliza-
tion.

The Legislative Council may make laws for imparting the privileges of naturalization; but such privileges will only be enjoyed within the limits of the Colony, and the law will be subject to be confirmed or disallowed by Her Majesty in the same way as other laws or Ordinances [33 and 34 Vict. c. 14, section 16].

Section V.—The Executive Council.

How
established.

The Executive Council was established by Letters Patent of the 19th March, 1833 [see *ante*, p. 68]. By Letters Patent of the 16th June, 1877, it was declared that this Council should be constituted in such manner and of such persons as might be directed by the Instructions accompanying those Letters or by any other Instructions which might, from time to time, be addressed to the Governor under the Royal Sign Manual and Signet or by Order in Council [see section 2].

Members.

The Executive Council is composed of the following officers:—The Lieutenant-Governor, if any, for the time being; the Senior Military Officer for the time being in Command of Her Majesty's Regular Troops, if not below the rank of Captain; and the persons for the time being lawfully discharging the functions of Colonial Secretary, Attorney-General, Auditor-General, and Colonial Treasurer. When the Senior Officer in Command of the Regular Troops is in the administration of the Government, his place in the Council is filled by the next Senior Officer, if not below the rank of Captain [Roy. Instr. 6th Dec., 1889, para. 4].

Seniority of
members.

The seniority of the members is according to the order in which the several offices above mentioned are enumerated, except that the Senior Military Officer, if he be below the rank of Lieutenant-Colonel in the Army,

has seniority next after the person for the time being lawfully discharging the functions of Attorney-General [Roy. Instr. 6th Dec., 1889, para. 5].

The Governor must communicate all Royal Instructions to the Executive Council as he may, from time to time, be directed, or as he may find convenient for Her Majesty's service to impart to them [Roy. Instr. 6th Dec., 1889, para. 6].

Communi-
cation to
Executive
Council of
Royal
Instructions.

The Executive Council should not proceed to the despatch of business unless duly summoned by authority of the Governor, nor unless two members at the least (exclusive of himself or of the member presiding) are present and assisting throughout the whole of the meeting at which any business is despatched [Roy. Instr. 6th Dec., 1889, para. 7].

When
Executive
Council
may proceed
to business.

The Governor should attend and preside at all meetings of the Executive Council, unless when prevented by some necessary and reasonable cause; and in his absence such member as the Governor may appoint, or in the absence of such member, the senior member of the Council actually present should preside [Roy. Instr. 6th Dec., 1889, para. 8].

President.

In the execution of the several powers and authorities granted to the Governor by any Letters Patent he should in all cases consult with the Executive Council, excepting only in cases which are of such a nature that in his judgment Her Majesty's service would sustain material prejudice by consulting the Council thereupon, or when the matters to be decided are too unimportant to require their advice, or too urgent to admit of their advice being given by the time within which it is necessary for him to act in respect of such matters. In all such urgent cases the Governor should at the earliest practicable period communicate to the Executive Council the measures which he may have so adopted, with the reasons therefor [Roy. Instr. 6th Dec., 1889, para. 9].

Governor to
consult
Executive
Council.

Submission
of questions
to Executive
Council.

The Governor alone is entitled to submit questions to the Executive Council for their advice and decision, but if he decline to submit any question to the Council when requested in writing by any member so to do, such member may record upon the minutes his written application, together with the answer which may be returned by the Governor to the same [Roy. Instr. 6th Dec., 1889, para. 10].

When
Governor
may act in
opposition to
advice of
Executive
Council.

The Governor may, in the exercise of the powers and authorities granted to him by any Letters Patent, act in opposition to the advice given to him by the members of the Executive Council, if in any case he deems it right to do so; but in any such case he should fully report the matter to Her Majesty by the first convenient opportunity, with the grounds and reasons of his action. In every such case any member may require that there be recorded at length on the minutes the grounds of any advice or opinion he may have given upon the question [Roy. Instr. 6th Dec., 1889, para. 11].

Minutes of
proceedings.

Minutes should be regularly kept of all the proceedings and votes of the Executive Council, and at each meeting the minutes of the last preceding meeting should be read over, and confirmed or amended, as the case may require, before proceeding to the despatch of any other business. Twice in each year the Governor should transmit to Her Majesty, through one of the Principal Secretaries of State, a full and exact copy of all minutes for the preceding half-year [Roy. Instr. 6th Dec., 1889, para. 12].

Section VI.—The Public Service.

Appointment
of public
officers.

Public offices in Ceylon are generally granted in the name of Her Majesty, and are holden during Her Majesty's pleasure.

The general rule is that all public offices of considerable rank, trust, and emolument should be granted by an instrument under the Public Seal of the Colony

in Her Majesty's name. The appointment may be made either provisionally, when the instrument is issued under authority of Her Majesty's General Instructions and subject to the Royal approval; or absolutely, when the instrument is issued in pursuance of Her Majesty's special Instructions [which Instructions are conveyed to the Governor through one of Her Majesty's Principal Secretaries of State], and when prescribed by the Queen's Letters Patent or Instructions or by local law or other authority in the form of warrants under the Royal Sign Manual and Signet [Col. Office R. & R. Art. 65].

The distinction between offices which are, and offices which are not, of considerable rank, trust, and emolument, being in itself vague and indefinite, has been rendered as precise as the nature of the case admits by the following description:—Offices are classed under three heads: (1) those of which the emoluments do not exceed one hundred pounds per annum; (2) those of which the emoluments exceed one hundred and do not exceed two hundred pounds per annum; and (3) those of which the emoluments exceed two hundred pounds per annum [R. & R. Art. 66].

[In Ceylon the limits are Rs. 1,500 and Rs. 3,000.]

When a vacancy occurs in the first or lowest of the three classes last mentioned, the Governor, as a general rule, has the absolute disposal of the appointment, subject only to the condition of reporting every such appointment by the first opportunity [R. & R. Art. 67].

When a vacancy occurs in the second or middle class, the Governor reports it to the Secretary of State, together with the name and qualifications of the person whom he has appointed to fill it provisionally and intends to appoint to fill it finally, which recommendation is almost uniformly followed [R. & R. Art. 68].

When a vacancy occurs in the third or highest class, the Governor follows the same course as to reporting

the vacancy and provisional appointment; but he is distinctly to apprise the object of his choice that he holds the office in the strictest sense of the word provisionally only until his appointment is confirmed or superseded by Her Majesty. He is at liberty also to recommend a candidate for the final appointment, but it must be distinctly understood that the Secretary of State has the power of recommending another instead. In these cases the confirmation or other final appointment takes place in the form already mentioned [R. & R. Art. 69].

Recommendations by Governor to appointments in Public Service.

It is of course impossible to lay down any general rule for deciding in what cases the recommendation of a Governor will, or will not, be ultimately sanctioned and confirmed by the Queen; but in general it may be stated that Her Majesty will be advised to regard more favourably appointments which are in the nature of promotions of meritorious Public Servants than appointments made in favour of persons new to the Public Service; and that when any office has been created, the Governor's recommendation for filling it up will carry with it less weight than in the case of offices which the Governor may have already established. In the cases of such new offices there will always be more than usual reason to anticipate that an appointment will be made directly from England [R. & R. Art. 70].

Gentlemen connected with the Governor.

Appointments of gentlemen connected with the Governor, or who have accompanied him to the Colony as Private Secretaries or otherwise, are open to much objection, and will rarely be confirmed. Provisional appointments of this kind should be reported to the Secretary of State without any recommendation as to the mode in which the office should be permanently filled. Should such an appointment be made at a time when a Governor is about to leave the Colony, his successor will be expected to report on the mode in which the office should be permanently filled [R. & R. Art. 71].

It is further to be understood that, in determining the propriety of appointments from England or from the Colony, regard will probably be had to the comparatively advanced state of wealth and population in the Colony, and to the number of properly qualified candidates among whom the local authorities may have the opportunity of making a selection [R. & R. Art. 72].

Matters to be considered in making appointments to Public Service.

In the distribution of the patronage of the Government in the Colonies great weight must always be attached to local services and experience. Every Governor will therefore make, once in each year, a *Confidential Report* of the claims of candidates, whether already employed in the Public Service or not, whom he may consider to possess those qualifications, in order that, when a vacancy or an opportunity for promotion occurs, the Secretary of State may have before him additional means, besides the immediate recommendation of the Governor, for judging how far the particular candidate recommended by the Governor is on the whole the best qualified, and whether a candidate of proper qualifications is to be found in that or in any other Colony. The Governor will ascertain and report upon the qualifications of other candidates, of whom he may have less knowledge, when he sees sufficient reason for supposing that the Public Service might gain by their admission into it; but in the application of these rules much must be left to the Governor's discretion [R. & R. Art. 73].

"Confidential Report" by Governor.

In reporting a vacancy in any office under the Crown, of which the emoluments exceed £200 [in Ceylon, Rs. 3,000] per annum, or in reporting the création of any such office, the Governor will furnish in the form of the schedule prescribed therefor, and in duplicate, full particulars respecting the nature and incidents of the office, and will state in the covering despatch whether persons filling that or similar offices have been

Reporting vacancies.

usually selected by the Secretary of State or by the Governor [R. & R. Art. 74.]

Chief Judicial
and Fiscal
offices.

In the case of the chief judicial and chief fiscal offices in a Colony in which the Crown is responsible for the appointments, local connection with the Colony by birth, family ties, or otherwise, will be considered, generally speaking, to render a candidate ineligible [R. & R. Art. 75].

Public officers
engaging in
trade.

All salaried public officers are prohibited from engaging in trade or connecting themselves with any commercial undertaking without leave from the Governor approved by the Secretary of State. As a general rule, this prohibition will be made absolute in the case of officers whose remuneration is fixed on the assumption that their whole time is at the disposal of the Government. No officer on leave of absence or on vacation leave is permitted to accept any employment without previously obtaining the express sanction of the Governor or of the Secretary of State [R. & R. Art. 76].

No public officer is to undertake any private agency in any matter connected with the exercise of his public duties [R. & R. Art. 77].

Public officers
and the press.

No paid officer under the Government of a Colony can be permitted to be the editor of a newspaper, or to take any active part in the management of it. He may furnish articles signed with his name upon subjects of general interest, abstaining from writing on questions which can properly be called political, or discussing the measures of the Government, or the official proceedings of its officers, and from furnishing any articles whatever to a newspaper which, in commenting on the measures of the Government, should habitually exceed the bounds of fair and temperate discussion. If the authorship of anonymous articles should be brought home to any officer, or, if in articles bearing his signature, he should discuss any political subject,

or the measures of the Government, or the official proceedings of its officers, he will be liable to be removed from office [R. & R. Art. 79].

No public officer is allowed to receive a grant of money by a Colonial Legislature, if such grant has not been initiated or authorised by the Governor [R. & R. Art. 80].

Grants of money to public officer.

Holders of patent offices may be removed from such offices by the Governor and Council of a Colony under section 2 of 22 Geo. III. c. 75, but care must be taken that the officer is heard after being apprised of the charge against him, and it will be convenient that the course prescribed in case of suspension* should be pursued in any proceedings for removal [R. & R. Art. 81].

Suspension and dismissal from office.

Against any such removal an appeal lies to Her Majesty in Council, which should be prosecuted like any other appeal [R. & R. Art. 82].

The power of the Governor and Council to remove persons from office under the statute mentioned above was decided by the Judicial Committee in *Willis v. Sir George Gipps* [5 Moo. P. C. C. 379] to apply to judicial offices,† and therefore exercisable in the case of a Judge of the Supreme Court of New South Wales; but in that particular case they considered that the Governor and Council ought to have given the Judge some opportunity of being previously heard against the motion, and on that ground reversed the order of motion.

Willis v. Sir George Gipps.

This decision was approved in *Montagu v. Lieutenant-Governor of Van Diemen's Land* [6 Moo. P. C. C. 489], where the appellant had had full notice of the charges against him, and had defended himself; and it appearing there were sufficient grounds for the

Montagu v. Lieutenant-Governor of Van Diemen's Land.

* See *infra*.

† As to liability of Judges for their acts, see *Kemp v. Neville* [10 C. B. N. S. 523] and notes thereto in Brown's Constitutional Law.

amotion, the Judicial Committee declined to recommend Her Majesty to reverse the order, notwithstanding a slight irregularity in the proceedings in which it was made.

Ex parte
Robertson.

In *e. p. Robertson* [11 Moo. P. C. C. 288] the Judicial Committee refused to consider an appeal against the amotion by the Governor-General and Executive Council of New South Wales of a Commissioner of Crown lands in that Colony, on the ground that they did not enter into the consideration of such acts as were done by the Governor and Council of a Colony in the exercise of the power and authority committed to them, whereby they dismissed persons from holding situations in that Colony, they holding them not by any patent right, but simply and only during the pleasure of the Governor.

Memorandum by the Lords of the Council as to removal of Colonial Judges.

The following Memorandum with reference to the removal of Colonial Judges was drawn up by order of the Lord President, in pursuance of a request from Earl Granville, the Secretary of State for the Colonial Department, and submitted to and confirmed by the Lords of the Council in 1870 [6 Moo. P. C. C. N. S. Appendix IX.] :—

“It is obvious that some effectual means ought to exist for the removal of Colonial Judges charged with grave misconduct; and these means ought to be less cumbrous than those existing for the removal of one of Her Majesty’s Judges in England. The mode of procedure ought to protect Judges against the party and personal feelings which sometimes sway Colonial Legislatures, and to ensure to the accused party a full and fair hearing before an impartial and elevated tribunal.

“Hence it was considered in the case of Mr. Justice Boothby that although the Legislature of South Australia had passed addresses to the Crown for his removal, that measure did not suffice, as it would have done in England; and that although the Legislature might act

as his accuser, it rested with the advisers of the Crown in England to dispose of the charges against him.

“All the forms of suspension and removal which are in use lead by different roads to the same result, viz., a hearing before the Privy Council.

“When a positive ‘motion’ has been made by a Governor under Burke’s Act [22 Geo. III. c. 75], the appeal to the Queen in Council is *strictissimi juris*, being provided by the statute itself.

“When an order of suspension from office has been made, the matter has commonly been referred by the Queen to the Judicial Committee, on the recommendation of the Secretary of State, though not invariably so, as in some cases the Secretary of State himself advised the Crown to confirm or to disallow the suspension.

“The reference may be made to the Judicial Committee, or to a Committee of Council generally; but if it be made to the Judicial Committee, it is desirable that the Lord President and the Secretary of State for the Colonies should sit with the Judges on the hearing. This course has been pursued with advantage in several instances.

“When charges are brought by a Colonial Assembly against a Judge in the shape of a petition to the Queen in Council for his removal, as in the cases of Chief Justice Boulton from Newfoundland, Mr. Justice Sanderson from Grenada [see *post*, p. 92], and Chief Justice Beaumont from British Guiana, the Privy Council exercises a species of original jurisdiction on these petitions, which shall be considered presently.

“It may be remarked, generally, that it is extremely difficult, and might be highly injurious to the Public Service, to lay down an inflexible rule as to the mode of procedure to be adopted in all cases of this nature. When a Judge is charged with gross personal immorality or misconduct, with corruption, or even with

irregularity in pecuniary transactions, on evidence sufficient to satisfy the Executive Government of the Colony of his guilt, it would be extremely improper that he should continue in the exercise of judicial functions during the whole time required for a reference to England, or a protracted investigation before the Privy Council. Immediate suspension is in such cases a necessity, if much greater evils are to be avoided. But it must be borne in mind that a Governor who resorts to such a measure takes it at his own peril, and is bound to make out a complete case in justification of it. When such cases come to be investigated at home, both the Governor and the Judge are on their trial; and to have taken unwarrantable proceedings against a Judge would doubtless be regarded as a most serious offence on the part of an Executive Officer.

“On the other hand, when the charges against a Judge consist, not in any acts of personal misconduct, but in a cumulative case of judicial perversity tending to lower the dignity of his office and perhaps to set the community in a flame, it is more difficult for the local Executive to act on its own responsibility. It is in cases of this description that petitions for the removal of Judges have been addressed to the Queen in Council by Colonial Legislatures.

“This last mentioned mode of proceeding has been found by the Lords of the Judicial Committee to be more dilatory, more expensive, more onerous to the parties, and less satisfactory to their Lordships, than the mode by way of previous suspension or amotion; and that for the following reasons:—The Privy Council, accustomed to act as a Court of Appeal—that is, to review the evidence and decision of inferior tribunals—has by its constitution considerable difficulty in exercising an original jurisdiction, especially when the evidence has to be transmitted from the Colonies. No

regular system of pleadings and procedure can be said to exist in such cases. The consequence is that, the charges being often loose, vague, and multifarious, their Lordships have not found it easy to reduce them to distinct and positive issues of fact or law, such as are necessary to the maintenance of a quasi-criminal proceeding.

“As in ecclesiastical suits for the correction or removal of clerks, to which these proceedings offer some analogy, it is essential that the acts complained of should be clearly expressed, and that the accused person should have full notice of all that is to be proved against him.

“When the issues are settled comes the difficulty of the evidence. Both sides produce affidavits and other written evidence from the Colony. When a batch of affidavits has been filed on one side, application is made by the other side for time to answer them. Great delay and expense ensue ; and, as in the case of Mr. Beaumont, this kind of irregularity may protract the hearing of the case for two or three years, during which time the Judge, whom the Colony is seeking to remove, retains his office. When the case is completed by the parties or their agents and brought in for argument, it is often loaded with a mass of irrelevant matter. Over these proceedings, regulated as they are by the advice of counsel on either side, their Lordships can exercise but little control in the preliminary stages of the case, being themselves unacquainted with the merits of it.

“The mode of motion with the right of appeal, or of temporary suspension with a reference to England, is not open to these objections. The evil of an inefficient or discredited judicial officer is at once removed. The Governor, who feels called upon to take so decided a step, is bound to give the accused person full notice of all the charges brought against him, to call upon

him for his answer, and to hear it. This, therefore, affords a solid groundwork for his subsequent proceedings.

“Furthermore, the Governor, knowing that his decision will be reviewed in England on appeal, is bound, for his own justification, to send home the proceedings and evidence on which that decision rests in a clear and intelligible shape; and provision is made for the performance of this duty [Nos. 83, 84, 85, and 86 of the Colonial Regulations].

“If the matter is then referred by Her Majesty in Council to the Judicial Committee, their Lordships are at once in a position to deal with it. The delay and expense incidental to getting up a case at a distance from the original scene in dispute vanish. The case is, or ought to be, already complete. And if it be at once submitted to the judgment of their Lordships in a complete form, there is no reason that it should not be heard and disposed of in a very short time and at a small expense. Mr. Cloete’s case [8 Moo. P. C. C. 484] is a very fair sample of a proceeding judiciously conducted in this manner. That gentleman had been improperly removed from a judicial office on the 19th April, 1853; he was restored to it by their Lordships on the 20th February, 1854; and although he had undoubtedly suffered an injustice, their Lordships expressed their desire that he should be indemnified for the expense he had been unjustly put to; and he was, in fact, soon afterwards promoted to a higher judicial office.

“It is scarcely necessary to add that in Colonies having Legislative Assemblies those Assemblies cannot be deprived of their undoubted constitutional right to address the Crown for the removal of a Judge; and the exercise of this right is altogether independent of the course which the Governor of the Colony may think fit to adopt. When the charges against a judicial

officer originate with Assemblies, the form of address or petition is perhaps the most correct, though not the most convenient, form of proceeding. When the action for removal originates with the Governor, he has the power to give effect to it in his own hands, subject to the control of the Home authorities.

“The experience of the Lords of the Council, therefore, strongly corroborates the arguments stated in a paper presented to the Colonial Office by Sir F. Roger in favour of proceedings by the Governor, subject to a review by the Secretary of State or the Privy Council in England; and they have invariably found that in cases in which proceedings have originated with the local Assemblies, the delay, uncertainty, and expense have been greatly augmented. At the same time, when the misconduct charged is purely judicial, and therefore not properly amenable to the decision of the Executive authority, acting on advice of Law Officers or advisers of inferior rank, it would seem that the due maintenance of the independence of Judges requires that judicial acts should only be brought into question before some tribunal of weight and wisdom enough to pronounce definitively upon them; and this function appertains with peculiar fitness to the Privy Council, which, as a Court of Appeal, has to review the decisions of the Colonial Courts.”

A memorial having been presented to the Queen by one branch of a Colonial Legislature complaining of the conduct in his office of a Chief Justice of the Colony, and praying the Crown to adopt such measures of relief to the inhabitants of the Colony as should seem expedient and justifiable, and setting forth eleven particulars of charges against the Chief Justice; the Judicial Committee, to whom the memorial and a counter one of the Chief Justice were referred, reported that in the course of fourteen years of office several instances of intemperate, and in some cases illegal, conduct had been

Representatives
of Grenada v.
Sanderson.

established against the Chief Justice ; but having regard to the length of time elapsed since all the acts except one were committed, and to the fact that the last of the acts (three years before), though erroneous and improper, was committed in the execution of what the Chief Justice thought his duty, they did not think, sitting judicially, they could say he ought to be removed for misconduct. [*Representatives of the Island of Grenada v. Sanderson*, 6 Moo. P. C. C. 38].

Rules as to
suspension of
public
officers.

The following rules, unless the mode of suspension is otherwise provided for by some local law, must be strictly observed in proceeding to suspend from the exercise of his office any public officer who has been appointed by virtue of a Commission or Warrant from the Crown, or whose emoluments exceed £100 (in Ceylon, Rs. 1,500) a year [R. & R. Art. 83].

The Governor shall signify to the officer, by a statement in writing, the grounds of the intended suspension, and shall call upon him to state in writing, before a day to be specified (which day must allow a reasonable interval for the purpose), any ground upon which he relies to exculpate himself [R. & R. Art. 84].

If the officer does not furnish such statement within the time fixed by the Governor, or if he fails to exculpate himself to the satisfaction of the Governor, the Governor shall apprise the officer that on a day, to be specified, the question of his suspension will be brought before the Executive Council, and that he will be allowed, and, if the Council so determine, required to appear before the Council, and defend himself orally [R. & R. Art. 85].

If any witnesses are examined by the Council, the officer must be allowed the opportunity of being present and of putting questions on his own behalf. The officer must also be given a copy of any documentary evidence that is to be used against him, and that has not been already furnished to him [R. & R. Art. 86].

If in the course of the inquiry further grounds of suspension are disclosed, the Governor, if he thinks fit to proceed upon such grounds, shall furnish the officer with a written statement thereof, and shall take the same steps as are above prescribed in respect of the original grounds of suspension [R. & R. Art. 87].

If in any case the Governor considers that the interests of the Public Service require that an officer should cease to exercise the powers and functions of his office, as, for instance, in the custody of public money, instantly or before the proceedings above prescribed can be completed, he may at once interdict the officer from the exercise of the powers and functions of his office. The Governor shall in all cases allow the interdicted officer to receive half the salary of his office until proceedings for his suspension have been taken, and may in special cases allow a larger amount not exceeding the full salary; but no such officer can be formally suspended from his office or deprived of his whole salary except upon such formal proceedings as are above prescribed, which must in all cases be taken with as little delay as possible [R. & R. Art. 88].

If upon the inquiry the Executive Council are of opinion that the officer deserves punishment, but not the full penalty of suspension, the Governor may remove the officer to an office of lower rank in the Service, or may require him to serve in his original office at a reduced salary, either permanently or for a stated period, or may deduct a portion of salary due or about to become due to the officer [R. & R. Art. 89].

If the officer is suspended or otherwise punished as above mentioned, the Governor shall, without loss of time, report the matter to the Secretary of State for approval and confirmation, transmitting the minutes of Council, the written statements, and all material documents relating to the case. If the officer is

suspended, the Governor shall at the same time transmit the usual return required in the case of a vacancy in a certain prescribed form [R. & R. Art. 90].

If the officer is suspended, the Secretary of State, instead of confirming the suspension, may direct the Governor to subject the officer to one of the lesser punishments above mentioned, or if, in lieu of suspension, the officer has been so punished by the Governor, the Secretary of State may direct the Governor to reduce or to increase the punishment already awarded [R. & R. Art. 91].

If the suspension of an officer is not approved and confirmed by the Secretary of State, and no other punishment is awarded, the officer will be entitled to the full amount of salary which he would have received if he had not been suspended, even though the officer discharging the functions of the office in the meanwhile has been allowed to receive some portion of the salary of the office [R. & R. Art. 92].

If the suspension is approved and confirmed by the Secretary of State, all salary will cease from the day of suspension, and although the officer should be subsequently restored, as an act of indulgence, he will not be entitled to any portion of salary during the period of his suspension. Pending the decision of the Secretary of State, the Governor, with the advice of the Executive Council, may grant a small alimentary allowance to an officer who has been suspended, and who appears urgently to need such assistance [R. & R. Art. 93].

Forfeiture by
public officer
of claim to
retiring
allowance.

An officer whose suspension is approved and confirmed by the Secretary of State forfeits all claim to a retiring allowance, even though he should have paid contribution towards such allowance [R. & R. Art. 94].

If criminal proceedings are instituted against a public officer, proceedings for his suspension upon any

grounds involved in the criminal charge shall not be taken pending the criminal proceedings [R. & R. Art. 95].

If an officer is convicted on a criminal charge, the Governor may cause the proceedings of the Criminal Court on such charge to be laid before the Executive Council, and if the Council are of opinion that the officer should be suspended on account of the offence for which he has been convicted, he may thereupon be suspended without taking any of the proceedings above prescribed, but his suspension must be reported to the Secretary of State for approval and confirmation [R. & R. Art. 96].

Proceedings on conviction of an officer on a criminal charge.

An officer acquitted on a criminal charge is not thereby rendered exempt from suspension on account of his conduct in the matter, and the Governor, if he thinks fit, may take the usual proceedings for the purpose [R. & R. Art. 96a].

Effect of acquittal on criminal charge.

An officer who is under suspension may not leave the Colony, during the interval before he is reinstated or dismissed, without the leave of the Governor. If granted leave of absence, the officer will not be entitled to any more salary than if he had remained in the Colony [R. & R. Art. 96b].

Any officer, whether under suspension or not, who absents himself from the Colony without leave, will be held to have thereby vacated his office [R. & R. Art. 96c].

Officer absenting himself from Colony without leave.

An officer who has not been appointed by virtue of a Commission or Warrant from the Crown, and whose emoluments do not exceed £100 (in Ceylon Rs. 1,500) a year, may be dismissed by the Governor without the proceedings above prescribed; but in every such case the grounds of dismissal must be definitely stated in writing and communicated to the officer, that he may have full opportunity of exculpating himself, and the matter must be investigated by the Governor with the

Dismissal of officer whose emoluments do not exceed Rs. 1,500.

aid of the Head of the Department, if any. In lieu of dismissal the Governor, if he thinks fit, may remove the officer to an office of lower rank in the Service, or may require him to serve in his original office at a reduced salary, either permanently or for a stated period, or may deduct a portion of salary due, or about to become due, to the officer. Such dismissal or other punishment will not require the confirmation of the Secretary of State, but any memorial from the dismissed officer must be forwarded to the Secretary of State without delay, with a short statement of the grounds of dismissal or other punishment [R. & R. Art. 96*d*].

Shenton v.
Smith.

Colonial Office
Rules do not
form part of
contract with
public officer.

With regard to the Regulations quoted above touching the subject of suspension of public servants, it was held by the Privy Council in the case of *Shenton v. Smith* [A. C. (1895) 229 ; 64 L. J. R. 119] that they were mere directions given by the Crown to the Governments of Crown Colonies for general guidance, and they do not constitute a contract between the Crown and its servants. Their Lordships observed : "No authority, legal or constitutional, has been produced to countenance the doctrine that persons taking service with a Colonial Government to which the Regulations have been addressed can insist upon holding office till removed according to the process thereby laid down. Any Government which departs from the Regulations is answerable not to the servant dismissed, but to its own official superiors, to whom it may be able to justify its action in any particular case."

Public
servants hold
office only
during
pleasure of
Crown.

In this case and in *Dunn v. The Queen* [1 Q. B. (1896) 116] and *De Dohse v. Reg.* [1 Q. B. (1896) 117, Note 7] it was held that servants of the Crown, except in special cases where it was otherwise provided by law, held their offices only during the pleasure of the Crown ; and in *Mitchell v. The Queen* [1 Q. B. (1896) 121] that no engagement made by the Crown with any of its Military or Naval Officers, in respect of services present,

past, or future, could be enforced in any court of law. On the other hand, where provisions regarding the steps to be taken in dismissing public servants are inserted in a Legislative Enactment, a servant cannot be dismissed in contravention of those provisions [*Gould v. Stuart*, A. C. (1896) 575; see also *Young v. Adams*, A. C. (1898) 469]; although the Crown may yet have the right to abolish the office without being liable in compensation as for breach of contract [*Young v. Waller*, P. C. (1898) A. C. 661].

*The precedence of Colonial Officers is in some cases determined by Colonial Enactments, by Royal Charters, by Instructions communicated either under the Royal Signet and Sign Manual through the Secretary of State, or by authoritative usage. In the absence of any such special authority, Governors are to guide themselves by the subjoined table [R. & R. Art. 155]:—

Precedency
of Colonial
Officers.

Table of Precedence of Colonial Officers.

[R. & R. Art. 156.]

The Governor, Lieutenant-Governor, or Officer administering the Government.

The Senior Officer in Command of the Troops, if of the rank of a General, and the Officer in Command of Her Majesty's Naval Forces on the Station, if of the rank of an Admiral, their own relative rank being determined by the Queen's Regulations on that subject.

The Bishop.

The Chief Justice.

The Senior Officer in Command of the Troops, if of the rank of Colonel or Lieutenant-Colonel, and the Officer in Command of Her Majesty's Naval Forces on the Station, if of equivalent rank, their own relative rank being determined by the Queen's Regulations on that subject.

The Members of the Executive Council.

The Puisne Judges.

The President of the Legislative Council.

The Members of the Legislative Council.

The Speaker of the House of Assembly.

The Members of the House of Assembly.

The Colonial Secretary, not being in the Executive Council.

The Commissioners or Government Agents of Provinces or Districts.

The Attorney-General.

The Solicitor-General.

The Senior Officer in Command of the Troops, if below the rank of Colonel or Lieutenant-Colonel, and the Senior Naval Officer of corresponding rank.

The Archdeacon.

The Treasurer, Paymaster-General,
or Collector of Internal Revenue.

The Auditor-General or Inspector-
General of Accounts.

The Commissioner of Crown Lands.

The Collector of Customs.

The Comptroller of Customs.

The Surveyor-General.

Clerk of the Executive Council.

Clerk of the Legislative Council.

Clerk of the House of Assembly.

Not being
Members of
the Executive
Council.

The above, of course, is in a large measure applicable to Colonies with responsible Government. In Ceylon the table of precedence is shortly as follows :—

The Governor, Lieutenant-Governor, or Officer administering the Government.

The Chief Justice.

The Senior Officer in Command of Troops.

The Bishop.

The Puisne Judges.

The Members of the Executive Council.

The Attorney-General.

The Treasurer.

The Auditor-General.

The Government Agent for the Western Province.

The Government Agent for the Central Province.

The Surveyor-General.

The Collector of Customs at Colombo.

The Unofficial Members of the Legislative Council,
according to appointment.

The other Government Agents.

The Archdeacon.

The Clerk of the Councils.

Beyond this the table is not settled.

Persons entitled to precedence in the United Kingdom or in Foreign Countries or in other Colonies are not entitled, as of a right, to the same precedence in a Colony, but in the absence of any special instructions from the Queen the precedence of such persons relatively to the above-mentioned Colonial Officers will be determined by the Governor, having regard to the social condition of the Colony under his Government [R. & R. Art. 158].

By Circular Despatch of the 26th February, 1889, it is directed that Members of the Royal Family should take precedence next after the Governor of the Colony, and the Governors of other Colonies should have precedence next after the Military and Naval Officers Commanding Her Majesty's Forces and being of the rank of General or Admiral, respectively.

CHAPTER IV.

THE COURTS OF CEYLON: THEIR HISTORY,
CONSTITUTION, AND POWERS.

The three
departments
of Justice
under the
Dutch.

*“The Government of Ceylon, with respect to its Judicial power, was divided into three departments:—

“1st, Colombo, whose immediate jurisdiction extended along the West Coast of the Island from the river Bentotte on the South as far as the limits between Putlam and Manaar.

“2nd, Jaffnapatam, whose Courts of Justice exercised jurisdiction in the Northern and Eastern parts of the Island, from the limits of Putlam and Manaar to the river Koomane or Koombookkan which separated the country of Batticaloa from that of Matura.

“3rd, Galle, whose Courts of Justice exercised jurisdiction in the Southern parts of the Island from the river Koomane to that of Bentotte.

“Appeals lay from the two last-mentioned courts to that of Colombo; and all civil causes above a certain sum, and all criminal causes affecting persons above the rank of sergeant, might be carried by appeal from Colombo to the High Court of Justice at Batavia.

“All criminal causes were revised by the Governor in Council, who approved or suspended the sentence; but in civil causes the Governor alone reviewed the judgments of the Courts of Galle and Jaffna and modified them agreeably to his pleasure. This Judicial authority vested in the Governor alone continued since the time of Governor Falck.

“These three Courts of Justice in Ceylon were not composed, like those of Batavia, of persons trained to

* This account of the Courts under the Dutch is from Cleghorn's Minute [see *ante*, p. 12].

law, and sent from Europe to administer justice in the Colonies, independently of the Executive power. The members of these courts were continually changing; they were appointed by the Governor from the Civil Servants or Military Officers possessing considerable revenues from the positions they held; and they were obliged to administer justice without additional salary. Their only perquisite, called 'Mentall geld' (or money to purchase cloaks), did not exceed £12 per annum.

"Besides these three Courts of Justice, there was an inferior one at Trincomalie, which probably owed its institution to the too extensive jurisdiction of Jaffnapatam, to which it was subordinate.

"In these three courts the office of President was filled, in Colombo, by the first Civil Servant after the Governor, and at Jaffnapatam and Galle by the first Civil or Military Officer of the place, who, being removable at pleasure, was dependent upon the Governor.

Presidents of
the three
Courts of
Justice.

"In each of these courts there was an officer called the Fiscal, who in some respects might be considered a Judge; in others, as the *Calumniator Publicus*. He was nominated by the Supreme Government of Batavia. In civil cases he deliberated and voted as a Judge; in criminal cases he was considered the public accuser. The functions of this officer were numerous and important, especially in Colombo. Besides his duty as Fiscal in criminal cases, he was obliged to superintend the carrying out of orders of Government, and to him was committed the inspection of the police of the town, of which he was Justice of the Peace. Although appointed from Batavia, he was entirely dependent on the Governor.

The Fiscal.

"In each of the three departments of justice mentioned above there was also an inferior court called the Civil Raad (or Council), whose members were composed partly of the Civil Servants of the Company and partly

The Civil
Raad.

of the Burgher inhabitants. Its jurisdiction extended no further than the town and its precincts, and it owed its institution to the necessity of disencumbering the Courts of Justice of a number of small causes which formerly were judged by them in the first instance.

“In civil cases it was judged expedient, and even necessary, to allow the people to preserve the laws and customs which had been established by their ancient princes or by the Kings of Kandy.

Territorial
divisions of
the posses-
sions of the
Dutch East
India
Company.

“The division of the Company’s possessions with respect to Presidencies differed from that established for the limits of the Courts of Justice. The latter consisted of three and the former of six divisions:—

“1st, Colombo, whose dependent country, under a Chief called Dissave, extended from the river Bentotte to that of Chilaw.

“2nd, Jaffnapatam, whose dependent country, under the Chief Military Officer, extended along the Northern parts of the Island, from the limits between Putlam and Manaar to the river Kokely, the limit of Trincomalie.

“3rd, Galle, also under a Military Commander, extended from the river Bentotte to that of Koombookkan, the limit of Baticaloa.

“4th, Trincomalie, formerly under a Civil, but latterly under a Military, Servant, extended from the river Kokely, the limit of Jaffnapatam, to the Wisgal, the limit of Baticaloa.

“5th, Baticaloa, under a Civil Servant, extended from the Wisgal to the Koombookkan.

“6th, Calpentyn and Putlam, also under a Civil Servant, extended from the river Chilaw to the limits of Manaar.

The Dissave.

“The country dependent upon Colombo was divided into eight corles, and these collectively were under the government or superintendence of a Civil Servant of

the Company, called a Dissave, who collected the revenues and administered justice to the inhabitants. That he might not interfere with the jurisdiction of the Fiscal, he resided at Hultsdorp, having there the different offices, warehouses, and servants for carrying on the various branches of his administration. As a Judge he was obliged to hear and decide all the complaints of the inhabitants who were not satisfied with the award of the Corle Mudliar. There was only one class excepted from his jurisdiction, the fishermen of Colombo and the adjoining river Mutwal. These were under the Secretary to the Government. In lesser criminal cases the Dissave also heard complaints and inflicted punishments. Those guilty of greater crimes were remitted by him to the Fiscal."

His functions
as Judge.

About sixty years before the time when Cleghorn wrote, a court was created called the Landraad or Country Council, of which the Dissave was officially President. "This Court was erected with a view to relieve him of a multitude of legal discussions. He referred to it all cases too complicated for his judgment, or which he had not the leisure to decide, and the inhabitants could appeal from the decisions of the Dissave himself to the Landraad whose forms of proceeding were simple, and the charges attending the few written deeds these required were fixed at one-half of those of the three Courts of Justice mentioned already, and to which appeals under certain restrictions could be made from the decisions of the Landraad. The Landraad was extremely popular, and its decisions were generally and justly respected.

Origin of the
Landraad.

"The Dissave was permanent President of the Landraad of Colombo. Among the other permanent members, who were five in number, was the Fiscal. To these were added five or six members appointed from the junior merchants whose employment did not require their constant attention.

The Landraad
of Colombo.

“Two members were obliged daily to attend the Court to inquire into and decide occasional disputes, and Committees of the Raad were often obliged to go to the country to investigate claims with regard to landed property on the spot.”

There were also Landraads at Chilaw, Jaffnapatam, Manaar, Galle, Matara, Trincomalie, Batticaloa, and Puttalam.

“The President and members of the Landraads, like the other Officers of Justice under the Dutch Government of Ceylon, had no separate allowance for acting as Judges. They received a small sum as Mentall geld (cloak money); but when any of its members were deputed by Commission to decide causes at a distance, their moderate expenses were defrayed by Government, if it required their attendance, or by any party to a suit, if he required it.”

The above, as noted already, is from the record known as “Cleghorn’s Minute” [see p. 12].

The following answer to a question put by the Royal Commission of Inquiry of 1830 to Sir Richard Ottley, the Chief Justice of that time, contains perhaps a more authentic account of the Courts of Justice under the Dutch. The Chief Justice was asked “to state generally the nature of the jurisdictions which were superseded by the then Courts of Justice after the conquest of the Island from the Dutch.” Beginning with the courts which exercised a civil jurisdiction, he said: “The first and highest Court was the *Hoff van Justitie*, which exercised an original jurisdiction in all suits between Europeans or the descendants of Europeans where the subject-matter in question exceeded the sum of one hundred and twenty rix dollars in amount.

*Hoff van
Justitie.*

“This court also exercised an original civil jurisdiction over natives residing in the Fort of Colombo or at any place within Kayman’s Gate, when the matter in

dispute was above one hundred and twenty rix dollars in value.

“The *Hoff van Justitie* exercised an appellate jurisdiction over the Landraad Court of Colombo and over the other court called the *Hoff van Kleine Gorechts Saken*.

“The *Hoff van Justitie* of Colombo exercised an appellate jurisdiction over the *Hoff van Justitie* of Galle, of Matara, and of Jaffna, and was the highest court in Ceylon and the court of last resort in all matters civil and criminal. But an appeal lay in all matters, both civil and criminal, from the judgments of this court to Batavia.

“Next in order came the Court of Landraad, which exercised a jurisdiction over natives in all disputes relative to land, and in matters of contract and debt wherein the matter in dispute exceeded the sum of one hundred and twenty rix dollars. This Court had exclusive jurisdiction over natives residing without the Fort of Colombo and Kayman’s Gate. An appeal lay from this court to the *Hoff van Justitie*.

Court of
Landraad

“The Judges of the Landraad Court were—the Dis-
save (President), the Fiscal (Vice-President), the first
Maha Mudliar, the Attapattu Mudliar, and the Thombu
Keeper.

Judges of the
Landraad.

“Besides these persons, who were permanent Judges, other persons were selected from amongst the junior merchants and bookkeepers to act as Judges occasionally.

“It is to be observed that if the defendant were a European or Burgher, the case was tried before the *Hoff van Justitie*; if the defendant were a native, by the Landraad.

“Inferior to the Landraad was the *Hoff van Kleine Gorechts Saken* for all matters of contract and debt not exceeding in value the sum of one hundred and twenty rix dollars. This court exercised jurisdiction over Europeans as well as natives to that amount.

*Hoff van
Kleine
Gorechts
Saken.*

“The court had jurisdiction over actions for civil injuries wherein damages alone were sought and a public apology was not demanded. An appeal lay from this court to the *Hoff van Justitie*.

“The *Hoff van Kleine Gorechts Saken* had no criminal jurisdiction of any description.

“The *Hoff van Justitie* consisted of seven or more Judges appointed by the Governor and Council.

“The Administrateur or Senior Counsellor was the President. The Fiscal, who was also a Counsellor, was the second Judge, and other members were chosen from the Counsellors, and others from the Civil and Military Services.

“There was no Vice-President to this court in Colombo; the Judges received no pecuniary remuneration by way of salary or otherwise.

“An appeal lay from this court to the *Hoff van Justitie* in Batavia in all cases in which the subject in dispute exceeded three hundred rix dollars.

“The system of judicial policy was the same at Galle; but there the Commodore was the President of the *Hoff van Justitie*. The next in rank was the Senior Member of Council called the Administrateur.

“There was a Court of *Kleine Gorechts Saken* also at Galle, and the same system prevailed at Matura and at Jaffna with trifling variations.

“At Jaffna the *Hoff van Justitie* consisted of nine members, of whom the Commodore was chief, and the Landraad consisted of one member of Council, some Civil Servants, and six of the native Modeliars.

“From the Landraad Courts and the *Kleine Gorechts Saken* at Galle, Matura, and Jaffna an appeal lay, in the first instance, to the *Hoff van Justitie* of each District respectively, and thence to the *Hoff van Justitie* in Colombo.

“Landraad Courts were established in all parts of the Island, at Trincomalie, and at Baticaloa. No *Hoff*

van Justitie was established in those districts, and so an appeal lay, in the first instance, to the *Hoff van Justitie* at Jaffna; and no Court of *Kleine Gorechts Saken* existed at Trincomalie or Baticaloa, and the Landraad at those places, of necessity, exercised jurisdiction over Europeans and Burghers as well as over natives.

"A distinction was made in some instances and a limitation was imposed on the power of appealing from this Island to Batavia. Whenever the *Hoff van Justitie* in Colombo exercised an appellate jurisdiction, and in pronouncing judgment concurred with the decision of the *Hoff van Justitie* at Galle, Matura, or Jaffna, when those Courts respectively exercised an appellate jurisdiction, no further appeal was admitted. But when two concurrent judgments did not exist, and the Appellate Courts differed in judgment, an appeal lay from those judgments to Batavia; but no appeal lay to Batavia unless the matter in dispute amounted to three hundred rix dollars.

"The District of Chilaw was subject to the Judges of Colombo.

"The Districts of Putlam and Calpentyn had Courts of Landraads of their own.

"Besides these courts, a *Weeskamer*, or orphan chamber for the protection and administration of orphans' property, was established in Colombo as well as at Galle and Jaffna for Europeans and their descendants, and a *Boedelkamer* for the estates of the orphans of natives.

The *Weeskamer* and the *Boedelkamer*.

"Matrimonial cases between Europeans and Burghers were examined by Commissioners appointed annually by the Governor and Council, and the Commissioners reported their proceedings to the *Hoff van Justitie*, which decided on those cases so reported.

"All matters of divorce, whether arising between Europeans, Burghers, or natives, were cognizable by the *Hoff van Justitie* alone; but if the suit was only for separation between natives, the Landraad decided.

"It is proper to observe that the Judges received no pecuniary compensation in any case, and all matters of law were decided by them without any salary or other emoluments accruing to them for the time consumed and the trouble undertaken in the discharge of their judicial functions.

Criminal
Courts.

"The highest court of criminal jurisdiction in this Island was the *Hoff van Justitie* of Colombo, in which were tried all capital cases and those which were of too great magnitude for the cognizance of the Fiscal.

"This jurisdiction was exercised as well over natives as Europeans.

"An appeal lay from the sentence of this court to Batavia in all cases which were conducted according to the ordinary mode of proceeding.

The Fiscal's
Court.

"The next court was that of the Fiscal, which took cognizance of all minor offences committed by Europeans, Burghers, or natives. The Fiscal had power to inflict as many as one hundred lashes and to impose a fine to the amount of one hundred dollars, but had no power to imprison except for non-payment of a fine.

"The criminal courts established at Galle, Matura, and Jaffna were almost exactly similar to those in Colombo; but an appeal lay to the *Hoff van Justitie* in Colombo, and thence to Batavia.

"At Trincomalie and Baticaloa no *Hoff van Justitie* was established, but the Upper *Hoofd* stood in the place of the Fiscal, and had the same jurisdiction as the Fiscal had in Colombo over minor offences. In the more aggravated cases the Fiscal and two members of the Court of Landraad took information, which was transmitted to Jaffna, and the case was tried there in the *Hoff van Justitie*.

"The proceedings in criminal cases were either ordinary or extraordinary. In the latter case—namely, when the proceedings were extraordinary—certain Commissioners were appointed by the *Hoff van*

Justitie. These Commissioners took information and heard witnesses on both sides. When these informations were closed, the Fiscal or Public Prosecutor filed a libel and demanded judgment against the accused. At that stage of the case the prisoner might petition the court to have the proceedings carried forward in the ordinary way, and if his petition were allowed he filed his answer, to which the Fiscal put in a replication and the prisoner a rejoinder, and when these proceedings were closed, the Fiscal demanded judgment; but the court might send the case back to the Commissioners to obtain further evidence; and each of the parties addressed written arguments to the court, but did not address the court orally.

"The Fiscal could not see the argument of the prisoner, nor the prisoner that of the Fiscal.

"The witnesses were examined in the presence of the prisoner."

Of the Courts mentioned above, the Landraads apparently ceased to exercise jurisdiction at the time of the capitulation, and "for the purpose of dispensing justice in lieu or in place of the native courts which had at that time surceased all judicial proceedings," a "Court of Equitable Jurisdiction" was established in Colombo [see Proclamation No. 2 of the 14th October, 1799].

By the Proclamation of 23rd September, 1799, it was directed and ordained that, for the further administration of justice among the native inhabitants of the settlements in Ceylon, "the functions of the Country Courts, commonly called Landraads," should be immediately resumed, and that justice be therein administered as nearly as circumstances would permit according to the Regulations published and established by William Jacob Vander Graaff, late Governor of those settlements, and such further Regulations as were by the said Proclamation, or should thereafter lawfully be introduced and established in that behalf.

*Hoff van
Justitie.*

By the same Proclamation it was provided that the criminal functions of the three Chief Courts held in the towns of Colombo, Jaffnapatam, and Galle, and called respectively *Hoff van Justitie*, should be consolidated and exercised by one Tribunal, to be composed of the Governor and the Chief or other Associate Judge or Judges, as might be named by a Commission to be issued by the Governor. This criminal jurisdiction was to be exercised at such places and times as to the Governor should seem expedient.

The inferior offences and disorders against the police, the cognizance of which formerly belonged to the Fiscal, were to be tried and punished by and before the Fiscal or such other person or persons as the Governor should think fit to appoint.

The Civil or
Town Court.

The Court of Matrimonial and Petty Causes, otherwise called the Civil or Town Court, in the towns of Colombo, Jaffnapatam, and Galle, with jurisdiction limited to the cognizance of civil causes to the amount in value of one hundred and twenty rix dollars, was to be styled the "Civil Court," and to have unlimited jurisdiction in respect of the value of the claims involved, with the additional power of decreeing the execution commonly called *Parata Executivie*.

Quorum of
Judges.

The *quorum* of Judges in the Civil Courts was reduced from five to one, and in the Criminal Courts from seven to three.

In all cases the opinion of the majority of the Judges assembled and sitting was to prevail. Where the court was equally divided, then, in civil cases, the President for the time being was to have a casting vote ; in criminal cases, the accused was to be acquitted and discharged.

Court of
Appeal.

The Governor, the Commander-in-Chief of the Forces for the time being acting as Lieutenant-Governor, and the Secretary of the Colony for the time being were to form a Court of Civil Jurisdiction for the hearing of appeals, and appeals to this Court were to be allowed

in all cases involving claims exceeding in value £200 or 2,000 rix dollars.

From this Court a further appeal was allowed to the King in Council in cases involving claims in excess of £500 or 5,000 rix dollars in value, and where the matter in question related to the taking or demanding any duty payable to the United Company of merchants of England trading to the East Indies or to any established fee of office, or annual rent or other such like matter or thing where the rights in future might be bound, an appeal, it was declared, would be admitted to His Majesty in his Privy Council, although the value of the claim was less than the sums mentioned above. An appeal to the King in Council was also to be permitted in cases of fines imposed for misdemeanours, provided they amounted to or exceeded £100.

Appeals to
King in
Council.

Appeals in civil cases in which the claims did not exceed £200 or 2,000 rix dollars in value, provided they exceeded 500 rix dollars or (in cases in the Landraads) 300 rix dollars, would, it was declared, be allowed to the Governor, or if he deemed it expedient, to him and such Chief or Associate Judge or Judges as he might by Commission appoint.

Appeals to
Governor.

The Governor was also to exercise ecclesiastical jurisdiction and the office commonly called the office of ordinary, in so far as it related to the collection of benefices and the granting of licenses for marriages and probates of wills.

Ecclesiastical
jurisdiction
of Governor.

By a Proclamation of the 14th October, 1799, a Court of Judicature for the exercise of criminal functions, as required by the Proclamation of the 23rd September, was formed, called the Supreme Court of Criminal Jurisdiction, and Judges thereto appointed. These Judges were to be Justices and Conservators of the Peace throughout the British Settlements. This court was to have and use a seal, and was to issue its warrant or precept to all Fiscals or other keepers of prisons to

Supreme
Court of
Criminal
Jurisdiction.

certify to it the several persons in their custody committed for the offences of "treason, murder, or other felony, forgery, perjury, trespass, or other crime, misdemeanour, or oppression," and produce them before it, together with such witnesses whose names should appear endorsed on the respective commitments.

"The Greater
Court of
Appeal."

The Court of Civil Jurisdiction for the hearing of appeals composed of the Governor, the Commander-in-Chief, and the Secretary of the Colony, constituted by the Proclamation of the 23rd September, was, by the Proclamation of the 14th October, to be called "The Greater Court of Appeal," and was to sit in the town of Colombo for hearing and determining all such appeals as lay within its jurisdiction, and it was to use a common seal. "The Greater Court of Appeal" was given jurisdiction to confirm or reverse all sentences and decrees appealed from, or to remit cases to the courts below for further proceedings, or to institute further inquiry before itself, and for that purpose to take fresh evidence.

"The Lesser
Court of
Appeal."

And for the hearing of appeals in cases not exceeding the value of £200 or 2,000 rix dollars as provided for by the Proclamation of the 23rd September, 1799, a court to be called "The Lesser Court of Appeal" was constituted by the Proclamation of the 14th October. This court was also to sit in the town of Colombo and have a separate seal, and was to have, within the extent of its jurisdiction, powers similar to those of "The Greater Court of Appeal."

Fiscals'
Courts.

By Proclamation of the 21st June, 1800, "Fiscals' Courts" were established at all places over which Fiscals were appointed. These were to consist of three members, of whom the Fiscal was to be President. They were to have jurisdiction to determine in a summary way all claims and demands arising upon dealings and contracts, "pleas of land excepted," where the sum or matter in dispute should not exceed twenty-five

rix dollars, and in all cases of common assaults and trespasses and thefts not exceeding the limits of petty larceny, and to impose fines not exceeding fifty rix dollars, or to imprison for terms not exceeding one calendar month, except for disobedience to decrees in civil suits, or to inflict corporal punishment to the extent of forty strokes.

The punitive power of these courts was subsequently [see Proclamations of the 2nd July, 1800, and 20th February, 1801] considerably increased.

By the Charter of the 18th April, 1801, was constituted "The Supreme Court of Judicature in the Island of Ceylon" [see sect. 6]. This court was to consist of and be holden by and before one principal Judge to be called "The Chief Justice of the Supreme Court of Judicature in the Island of Ceylon," and one other Judge to be called the "Puisne Justice" of the said court. These Judges were to be Barristers in England or Ireland, of not less than five years' standing; they were to be appointed by Letters Patent under the Great Seal of Great Britain and Ireland, and were to hold their offices during the pleasure of the Crown [sect. 7].

"The
Supreme
Court of
Judicature
in the Island
of Ceylon."
Its Judges.

The Chief Justice and the Puisne Justice were to be Justices and Conservators of the Peace within the British Settlements in the Island and their Dependencies [sect. 8]; and all sentences, judgments, decrees, rules and orders, and all acts of authority to be made or done by the Supreme Court were to be made and done by and with the concurrence of the Chief Justice and the Puisne Justice, if both of them be assembled and sitting; or if one only should be sitting, then by the Chief Justice or the Puisne Justice, as the case might be [sect. 9].

If the two happened to differ in opinion in any civil cause or matter, then the same was to be adjourned for seven days at the least, and if after such adjournment

the Justices continued to differ in opinion, then the opinion of the Chief Justice was to prevail ; and if they differed in opinion in any criminal matter, then a case was to be drawn up and submitted to the Governor or, in his absence from the Island, to the Lieutenant-Governor, whose decision on the matter at issue was to be final [sects. 10 and 11].

Either of the two Judges could sit and act alone as constituting the court, and do every act and thing necessary for the administration of justice in as full and ample a manner as if both had assembled and sat in the said court [sect. 12].

The court was to have a seal bearing His Majesty's Arms, to be kept by the Chief Justice or, during a vacancy, by the Puisne Justice [sect. 13] ; and all processes were to be issued under seal and in the name of the King [sect. 14].

The Chief Justice was to have precedence in the Island next after the Governor or, in his absence from the Island, the Lieutenant-Governor, and all such persons as by law and usage took place in England before the Chief Justice of the Court of King's Bench ; and the Puisne Justice was to have precedence next after the Governor or, in his absence from the Island, the Lieutenant-Governor, the Chief Justice, the Officer for the time being Commanding the Forces, and all such persons as by law or usage took place in England before the Justices of the Court of King's Bench [sect. 17].

Its juris-
diction.

The Supreme Court was to be a court of unlimited original civil jurisdiction for the Town and Fort of Colombo and the surrounding district declared by the Governor to be the " District of the Town and Fort " of Colombo [sect. 29]. This civil jurisdiction was to be exercised over all the inhabitants of the Town and Fort of Colombo and the District aforesaid, and over all persons who at the commencement of any suits against them should be commorant, although not domiciled therein ;

and over all persons, as well British as all others commonly known and distinguished in India by the appellation of Europeans, who should, at the commencement of suits against them, be resident in the British Settlements; and over all persons who should have been registered in the office of the Secretary of Government in the Island as persons licensed to reside within the said settlements [sect. 30].

The jurisdiction of the Landraad of Colombo in suits between natives of Ceylon or India, or in which there should be native defendants and which were then competent to be tried and determined by the said Landraad, was, if the Governor considered it expedient, to continue to be exercised [sect. 31].

The Supreme Court was also to be a Court of Equity, and to have full power and authority to administer justice in a summary manner according to the law then established in the British Settlements here, and in point of form as nearly as might be according to the Rules and Proceedings of the High Court of Chancery in Great Britain [sect. 39].

— as a Court
of Equity.

It was also given the power to appoint guardians and keepers for infants and their estates according to the order and course observed in England, also guardians and keepers of the persons and estates of “natural fools,” and of such as were or should be deprived of their understanding or reason by the act of God so as to be unable to govern themselves and their estates [sect. 41].

— for
appointment
of guardians,
&c.

The court was also declared a court of competent jurisdiction in causes relative to the Royal revenue, and was empowered to administer justice as nearly as might be according to the Rules and Orders of the Court of Exchequer in Great Britain and upon information filed by the Advocate Fiscal [sect. 42].

— in causes
relative to
Royal
revenue.

The Supreme Court was also given jurisdiction to administer criminal justice in respect of “treasons,

— in
criminal
matters.

murders, culpable homicides, rapes, thefts, robberies, forgeries, perjuries, concussions, trespasses, and other crimes, offences, misdemeanours, and oppressions" done or committed within the British Settlements [sect. 44].

Trial of
inferior
offences.

All inferior offences, breaches of the peace, and disorders against the police, the cognizance of which formerly belonged to the inferior Magistrates, were to be tried by and before such Justices of the Peace or Magistrates as should for that purpose be appointed by the Governor [sect. 50].

Testamentary
and Matri-
monial juris-
diction.

The court was also given jurisdiction in all Testamentary and Matrimonial causes, suits, and business over the inhabitants of the Town, Fort, and District of Colombo and over British and other European subjects in any part of the British Settlements, and over all persons who should have been registered in the office of the Secretary of Government as licensed to reside in the said settlements [sect. 52], provided that the jurisdiction in matrimonial causes was not to extend to the natives of the Island or persons usually known and distinguished in India by the appellation of natives [sect. 54].

Appeal to
King in
Council.

An appeal was allowed from an interlocutory sentence having the effect of a definitive sentence or from any definitive sentence of the Supreme Court to the King in Council, in cases in which the matter in dispute exceeded the sum of five hundred pounds or five thousand rix dollars [sect. 66]. There was, however, to be no appeal to His Majesty in criminal cases [sect. 71].

"The Civil Court" and "The Supreme Court of Criminal Jurisdiction" were to cease to exist, and the powers and authorities vested in them were to be exercised by the Supreme Court established by the Charter [sect. 88].

Jurisdiction
to issue writs
of *mandamus*,
certiorari,

The Supreme Court was further to exercise in all matters of criminal jurisdiction a general superintendence and control over the Advocates Fiscal, Justices of

the Peace, Fiscals, and Peace Officers within the British Settlements ; and all these officers were, as nearly as circumstances would admit, to be subject to the order and control of the Supreme Court to the same extent as inferior Magistrates in England were by law subject to the order and control of the Court of King's Bench ; and to this end the Supreme Court was empowered and authorised to decree and issue a mandate or mandates in the nature of a writ of *Mandamus*, *Certiorari*, *Procedendo*, or Error, directed to any Advocate Fiscal, Justice of the Peace, Fiscal, or Peace Officer, as the case might require, and to correct and punish any contempt or wilful disobedience of any such mandate [sect. 82].

procedendo,
&c.

In the event of a vacancy in the office of Chief Justice the Puisne Justice was to act as Chief Justice provisionally, and the Governor was to appoint a Puisne Justice provisionally [sect. 86].

Vacancy in
office of
Chief Justice.

By this Charter was also established a Court of Record to be styled "The High Court of Appeal in the Island of Ceylon." It was to be a court of civil jurisdiction for the hearing of appeals from all Courts of Justice in the British Settlements except the Supreme Court. This court was to be holden by and before the Governor or, in his absence from the Island, the Lieutenant-Governor, the Chief Justice, the Puisne Justice of the Supreme Court, and the Secretary of Government or any two of them, of whom the Chief Justice was to be one, in cases involving claims in excess of £200 or two thousand rix dollars, and in all other cases the Puisne Justice was to be one [sect. 88]. This court was to have a seal to be kept in the custody of the Governor or, in his absence from the Island, of the Lieutenant-Governor [sect. 91].

"The High
Court of
Appeal."

An appeal from an interlocutory order having the effect of a definitive sentence, or any definitive sentence of "The High Court of Appeal in the Island of Ceylon," was allowed to the King in Council in causes of the like

Appeal from
High Court of
Appeal to
King in
Council.

amount in value as mentioned above with reference to appeal from the Supreme Court [sect. 93].

Increase of jurisdiction of Sitting Magistrates and Fiscals' Courts.

By Proclamation of the 30th July, 1801, the punitive jurisdiction of the Sitting Magistrates and the civil and criminal jurisdiction of the Fiscals' Courts were increased.

Suppression of certain Landraads.

By Proclamation of the 20th August, 1801 [sect. 16], the Landraads of Jaffnapatam and Galle were suppressed, and their powers, authorities, and functions vested in the Civil Courts of those stations.

The Provincial Court of Colombo.

By Proclamation of the 13th February, 1802, the jurisdiction, civil and criminal, of Fiscals' Courts was increased, and in terms of section 31 of the Charter of 1801 [see p. 113 *ante*] it was declared that the Landraad of Colombo should continue to exercise its jurisdiction under the style and denomination of "The Provincial Court of Colombo."

Establishment of further Provincial Courts.

By Proclamation of the 25th June, 1802, the jurisdiction of the Landraads of Negombo and Kalutara was merged in that of the Provincial Court of Colombo; the Landraad of Matura and the Civil Court of Galle were suppressed, and their jurisdiction transferred to a court established at Matura styled the Provincial Court of that District; and the Landraads of Chilaw, Calpenty, and Putlam were also suppressed, and their jurisdiction vested in a court established at Putlam styled the Provincial Court of that District.

Justices of the Peace and the "Courts of the Justices of the Peace."

By the same Proclamation the Magistrates who theretofore came under the denomination of "Fiscal" were to be styled "Justices of the Peace"; and the Fiscals' Courts to be styled "The Courts of the Justices of the Peace"; and the designation "Fiscal" was to be confined to officers appointed under the Charter of 1801 for the purpose of executing process of the Supreme Court and for other purposes ministerial to the said Supreme Court in the said Charter particularly mentioned. Courts of Sitting Magistrates in towns and

other populous places were also instituted for the commitment of offenders and the trial and punishment of those charged with smaller offences. Their jurisdiction was increased by Regulations Nos. 1 and 2 of 1805 and No. 4 of 1807.

Courts of
Sitting
Magistrates.

By Proclamation of the 12th July, 1802, was established the Provincial Court of Jaffnapatam, and the jurisdiction of the Civil Court of Jaffnapatam and the Landraads of Manaar and Mullativoe transferred thereto; and by Proclamation of the 10th November, 1802, was established the Provincial Court of Trincomalie, and the jurisdiction of the Landraads of Trincomalie and Baticaloa transferred thereto.

Further
Provincial
Courts.

By a Proclamation of the same date the Courts of the Sitting Magistrates were vested with jurisdiction in civil matters limited to claims not exceeding fifty rix dollars in value; and by a further Proclamation of that date the matrimonial jurisdiction of the Supreme Court was extended to matrimonial causes between natives of the Island, or persons usually known and distinguished in India by the appellation of natives.

By Regulation No. 1 of 1805 it was provided that all Courts of Justices of the Peace should cease, and the Provincial Courts were vested with a criminal and civil jurisdiction throughout their respective Provinces.

Extension of
jurisdiction
of Provincial
Courts.

By Regulation No. 10 of 1806 was appointed a Sitting Magistrate for the Port of Colombo, and he was specially empowered to try all cases, civil and criminal, which related to the collection of the customs of the Port of Colombo.

Sitting
Magistrate
for Port of
Colombo.

By Regulation No. 5 of 1809 the Governor was empowered to constitute at different stations courts, to be called "The Minor Courts of Appeal," to receive appeals from the decisions of all the Provincial and other inferior courts within their respective jurisdictions in all civil cases under the amount appealable to

The Minor
Courts of
Appeal.

the High Court of Appeal, except cases touching His Majesty's revenue.

Extension of
jurisdiction
of Supreme
Court.

By the Charter of the 6th August, 1810, the Supreme Court was given civil and criminal jurisdiction over every part of the British Settlements in Ceylon and over every person and thing therein, and it was provided that the Supreme Court should sit in two divisions, the Chief Justice to form the first and the Puisne Justice the second division. The Chief Justice was to sit in Colombo and to make circuits through certain districts, and the Puisne Justice was to sit at Jaffna and to make circuits through certain other districts. Both Judges might sit and act together as constituting one court for all such purposes as the Chief Justice might from time to time think necessary. Trial by jury was introduced into the British Settlements in the Island [sect. 10], and all Provincial Courts were abolished and the Landraads re-established [sect. 14].

Introduction
of trial by
jury.
Abolition of
Provincial
Courts.

Charter of
1810.

The Charter of the 30th October, 1811, however, restored in a great measure the old order of things. By it the provisions of the Charter of the 6th August, 1810, as to the jurisdiction of the Supreme Court and its separate sittings, were annulled, and the two Judges were to proceed as they used to do before the granting of that Charter. The provisions of the Charter of 1810 as to the abolition of the Provincial Courts and the re-establishment of the Landraads were also annulled. The Provincial Courts were restored, and the Governor was given the power to establish Landraads at such places as he should deem fit.

Restoration
of Provincial
Courts.

"The Com-
missioner's
Court."

The
Provincial
Court of
Trincomalie.

By Regulation No. 13 of 1812 a court of civil jurisdiction, to be called "The Commissioner's Court," was established at Trincomalie with all the power, authority, and jurisdiction of a Provincial Court within and throughout the Town and District of Trincomalie; and by Regulation No. 2 of 1814 this court received

the designation of "The Provincial Court of Trincomalie."

By Regulation No. 7 of 1814 a court of civil jurisdiction, to be called "The Commissioner's Court," was established with all the power, authority, and jurisdiction of a Provincial Court, except in the instance of suits relating to the revenue, within and throughout the Town and District of Baticaloa.

Commissioner's Court
of Baticaloa.

Now came the Charter of the 18th February, 1833, whereby all the former Charters and Letters Patent were revoked, and all laws and usages repugnant to this Charter annulled, and certain courts which had from time to time been appointed to administer justice by the exercise of original jurisdiction in certain Districts and Provinces—namely, the courts known respectively by the names and titles of the Provincial Courts, the Courts of the Sitting Magistrates, the Court of the Judicial Commissioner, the Court of the Judicial Agent, the Courts of the Agents of Government, the Revenue Courts, and the Court of the Sitting Magistrate of the Mahabadde—were abolished [sect. 2].

Charter of
1833.

Abolition of
Provincial
Courts, Courts
of Sitting
Magistrates,
Court of the
Judicial Com-
missioner, &c.

The appellate jurisdiction of the Governor and of the Court of the Judicial Commissioner, and certain courts which had come into existence called the Minor Courts of Appeal and the Minor Courts of Appeal from Revenue Causes, were also abolished [sect. 3].

Abolition of
Minor Courts
of Appeal and
appellate
jurisdiction
of Governor.

And it was provided that the entire administration of justice, civil and criminal, should be vested exclusively in the courts constituted by this Charter, and in such other courts as might be holden within the Island under any commission issued in pursuance of the statutes made and provided for the trial of offences committed on the seas or within the jurisdiction of the Lord High Admiral or the Commissioners for executing his office, or under any Commission issued by the Lord High Admiral or the Commissioners aforesaid [sect. 4]. It was further provided that it should not be competent

to the Governor, by any law or ordinance, to establish any court for the administration of justice save as was expressly saved and provided by this Charter [sect. 4]. Submission of differences to the arbitration of certain assemblies of the inhabitants of villages known by "Gangsabes." the name of *Gangsabes* was expressly reserved [sect. 4].

"The
Supreme
Court of
the Island of
Ceylon."

Then, one Supreme Court, to be called "The Supreme Court of the Island of Ceylon," was established [sect. 5]. This court was to consist of a Chief Justice and two Puisne Justices, who were to be appointed by Letters Patent to be issued under the Public Seal of the Island in pursuance of His Majesty's Warrants, and were to hold office during the pleasure of the Crown [sect. 6].

The Chief Justice was to have rank and precedence above and before all subjects of the Crown excepting the Governor or Lieutenant-Governor, and such persons as by law or usage in England took precedence before the Chief Justice of the Court of King's Bench; and the Puisne Justices were to take rank and precedence above and before all subjects of the Crown excepting the Governor or Lieutenant-Governor, the Chief Justice, and the Officer for the time being commanding the Forces in the Island, and excepting such persons as by law or usage in England took place before the Puisne Justices of the Court of King's Bench; and the Puisne Justices were to take rank and precedence between themselves according to the priority of their appointments [sects. 9 and 10].

The Supreme Court was to have and use a seal which was to be kept in the custody of the Chief Justice, with full liberty to deliver the same to any Puisne Justice for any temporary purpose [sect. 11].

The Supreme Court was to be a court of appellate jurisdiction for the correction of all errors in fact or in law which should be committed by the District

Courts, and it was to exercise an original jurisdiction for the trial of all charges for crimes and offences committed throughout the Island, and the civil and criminal sessions of the Court were to be held by one Judge in each of the circuits into which the Island was or should be divided [sect. 31]. At the civil sessions of the Supreme Court assessors were to be associated with the Judge [sect. 33], and at these sessions all appeals from the District Courts of the circuit were to be disposed of [sect. 35]. The criminal sessions were to be held before a Judge and a jury of thirteen men [sect. 33].

The Supreme Court on any civil sessions to be held on any circuit was to have power to grant and issue mandates in the nature of writs of *Mandamus*, *Procedendo*, and *Prohibition* against any District Court within the limits of such circuit, and to transfer suits from one District Court to another within the same circuit [sect. 36].

At the criminal sessions of the Supreme Court held on any circuit the Court was to hear and determine all appeals from District Courts in criminal cases [sect. 38].

The Judge on circuit or in Colombo was given the power to reserve all questions of law, pleading, evidence, or practice in all civil and criminal cases for the whole Court in general sessions [sect. 47].

The Court, or any Judge thereof, was given the power to issue writs of *Habeas corpus* [sect. 49]. The Court was also to have the power to make rules of procedure to be observed by it and District Courts, which had, however, to be transmitted to His Majesty for his approbation or disallowance [sect. 51].

An appeal was allowed to His Majesty in Council from all final judgments, orders, &c., and decrees, orders, &c., having the effect of final decrees, orders, &c., in a civil action, provided the matter at issue was above the value

Appeal to
Her Majesty
in Council.

of £500, or involved directly or indirectly title to property or to some civil right exceeding the value of £500 [sect. 52].

District
Courts.

District Courts were, by this Charter, established in the different districts of the Island. They were to be holden before a Judge and three assessors. The Judges were to be appointed by Letters Patent and were to hold office during the pleasure of His Majesty [sect. 21].

The District Courts were to have unlimited civil jurisdiction, and criminal jurisdiction to hear, try, and determine prosecutions for all crimes and offences except those which by law might be punishable with death, or transportation, or banishment, or imprisonment for more than twelve calendar months, or whipping exceeding one hundred lashes, or fine exceeding £10 [sects. 24 and 25].

The District Courts were also to have the custody of the persons and estates of lunatics within their respective districts [sect. 26], to appoint administrators to the estates of intestates, to adjudicate upon the validity of wills, and to grant probates [sect. 27], and to take cognizance of all revenue cases [sect. 28].

By Letters Patent of the 28th January, 1843. and of the 2nd July, 1844, power was given to the Governor and the Legislative Council, as explained in an earlier part of this work [p. 6], to alter and amend the provisions of the Charter of 1833.

Justices of
the Peace.

By Ordinance No. 6 of 1843 power was given to the Governor to appoint Justices of the Peace under the Public Seal of the Island. Their duties were to administer oaths, to preserve the public peace, and to inquire into all crimes and offences committed within their respective districts.

Division of
the Island
into Circuits
and Districts.

By Ordinance No. 9 of 1843 the Island was divided into Circuits and Districts, and provision made for holding civil and criminal sessions of the Supreme Court in each circuit. At every criminal sessions of

the Supreme Court on any circuit in its appellate jurisdiction, three assessors were to be associated with the Judge at the hearing and determining of every appeal [sect. 9].

By Ordinance No. 10 of 1843 Courts of Requests were established with "Commissioners" to preside over them. They were empowered to "hear and determine in a summary way, and according to equity and good conscience," all actions for the recovery of debts, &c., not exceeding £5 in value, unless the matter in question should relate to the title of any land or to anything whereby rights in future might be bound [sect. 5]; and by Ordinance No. 11 of 1843 Police Courts were established. The persons to be appointed to preside over these courts were to be called Police Magistrates, and they were to hear, determine, and dispose of in a summary way all charges for crimes and offences committed wholly or in part within their respective districts, and not punishable by imprisonment, with or without hard labour, for a longer period than three months, or by fine exceeding £5, or by whipping exceeding twenty lashes [sect. 5].

By Ordinance No. 12 of 1843 power was given to the Governor to appoint Additional Judges to District Courts, and these courts were given an exclusive original matrimonial jurisdiction within their respective districts [sect. 15].

By Ordinance No. 15 of 1843 the powers of Justices of the Peace were enlarged.

Ordinance No. 20 of 1852 amended in certain respects the constitution of the Supreme Court, and, among other provisions, the Supreme Court was empowered and required to hear and determine, in Colombo, all appeals from the several District Courts and Courts of Requests in the Colony, and to exercise all such appellate powers, jurisdictions, and authorities as might theretofore have been exercised upon any circuit

Courts of
Requests.

Police Courts.

Power to
Governor to
appoint
Additional
District
Judges.

Enlargement
of powers of
Justices of
the Peace.

Power to
Supreme
Court to hear
appeals in
Colombo from
District
Courts and
Courts of
Requests,
and to issue
writs of

Habeas corpus, Mandamus, &c.

by the Judge of such court and the assessors associated with him, or as might have been exercised by a Judge of such court sitting in Colombo with three assessors. The court sitting in Colombo was further given full power and authority to grant and issue mandates in the nature of writs of *Habeas corpus* and writs of *Mandamus*, *Procedendo*, and *Prohibition* against any court in the Colony, and injunctions [sect. 7].

Extension of jurisdiction of Courts of Requests.

Ordinance No. 21 of 1852 empowered District Courts to be held without assessors except when the District Judge thought assessors to be necessary; and Ordinance No. 22 of 1852 extended the jurisdiction of Courts of Requests to hearing and determining in a summary way actions, including those for the recovery of land, the subject-matter of which did not exceed in value ten pounds, except actions for malicious prosecution, libel, slander, criminal conversation, seduction, breach of promise of marriage, separation *à mensa et thoro*, and divorce *à vinculo matrimonii* [sect. 3]. Ordinance No. 8 of 1859 repealed the Ordinance No. 22 of 1852, and consolidated the various laws relating to Courts of Requests. Similarly Ordinance No. 13 of 1861 repealed Ordinance No. 11 of 1843, and amended and consolidated the laws relating to Police Courts.

Inquiries into wrecks, &c.

Ordinance No. 4 of 1863 authorised District Courts to institute inquiries into wrecks, and suspend or cancel the certificate of any master, mate, or certificated engineer, and to demand the delivery of the same as authorised by the 23rd and 24th sections of "The Merchant Shipping Act Amendment Act, 1863."

Amendment of law touching administration of criminal justice.

Ordinances Nos. 1 and 17 of 1864 consolidated and amended in certain respects the law touching Justices of the Peace and the administration of justice in criminal cases; and Ordinances Nos. 18 and 28 of 1865 made further provision as to the times and places for holding the criminal sessions of the Supreme Court and proceedings thereat; and Ordinance No. 11 of 1868

amended and consolidated the laws of the Colony relating to the administration of justice, repealing most of the former enactments on the subject, no material change, however, being effected with reference to the nomenclature, constitution, or jurisdiction of the different courts.

Village Committees and Village Tribunals were established by Ordinance No. 26 of 1871. This Ordinance was from time to time amended and added to by Ordinances No. 10 of 1872, 12 of 1880, 8 of 1882, 34 of 1884, 15 of 1885, and 8 of 1887, and all these enactments were ultimately repealed by Ordinance No. 24 of 1889, which is now the principal Ordinance as to the committees and tribunals aforesaid. By it [sect. 28] the President of a Village Tribunal assisted by councillors is given civil and criminal jurisdiction in cases in which both parties are natives, or cases which, whether the parties thereto are natives or not, are by the parties by consent in writing in a certain prescribed form referred to be tried and decided by him. The civil jurisdiction extends to all cases in which the debt, damage, or demand does not exceed twenty rupees, and the party defendant resides within the subdivision in which the court is held, or in which the cause of action has arisen wholly or as to part within the subdivision; and also to actions in which the title to, interest in, or right to the possession of any land or immovable property is in dispute, provided the value of such land or immovable property or of the particular share, right, or interest in dispute in such action does not exceed twenty rupees, and the same or any part thereof is situated in such subdivision. It also extends to all cases whatever involving debt or damage not exceeding one hundred rupees, or claim to land or immovable property in which the land or interest in dispute does not exceed one hundred rupees in value, which the parties thereto by consent in writing in a certain prescribed form

Village
Committees
and Village
Tribunals.

Jurisdiction
of Village
Tribunals.

expressly refer to the tribunal to be tried and decided by it.

The criminal jurisdiction extends to cases of petty assaults, that is to say, assaults which may adequately be punished by no higher punishment than a fine of twenty rupees or rigorous imprisonment for two weeks; of petty thefts, that is to say, thefts where the property stolen does not exceed in value twenty rupees, or where the theft is not preceded or accompanied by violence to the person, and which may adequately be punished by no higher punishment than a fine of twenty rupees or rigorous imprisonment for two weeks; of malicious injury to property or boundaries where the damage does not exceed twenty rupees; and of cattle trespass under the Ordinance No. 9 of 1876, provided that the above offences shall have been committed, wholly or in part, within the subdivision.

The President and councillors before whom any case, civil or criminal, is instituted, or by whom it is partially tried, may refer the parties to the Court of Requests or Police Court having jurisdiction over the subdivision, if it appear to them that the case is one which from its circumstances may more properly be prosecuted before the higher tribunal [sect. 28, prov. 2].

The Attorney-General or any Crown Counsel having jurisdiction over the subdivision, in any criminal case, or the Government Agent having jurisdiction over the subdivision, in any case, civil or criminal, may stop the further hearing of such case before a Village Tribunal, and direct it to be tried by the Police Court or Court of Requests [prov. 3].

No case, civil or criminal, instituted for the protection of the revenue may be brought before a Village Tribunal [prov. 4].

Village Tribunals have power to punish by fine not exceeding twenty rupees any person convicted before them of any crime or offence, or of the breach of any rule

made by the inhabitants of the subdivision under section 6 of the Ordinance, and in case of the continued breach of a rule to impose a further fine not exceeding five rupees for each day such breach is continued after notice to the offender. They may also sentence offenders in default of payment of any fine to simple or rigorous imprisonment for any period not exceeding fourteen days [sect. 31].

The jurisdiction, civil and criminal, conferred on Village Tribunals, as respects the natives of the subdivisions in which they are established, and subject to the provisos in section 28, is exclusive, and cannot be exercised by any other tribunal on any plea or pretext whatsoever. It is the duty of any court, civil or criminal, whenever it appears to it that any case brought before it is one properly cognizable by a Village Tribunal, to stop the further progress of the case and to refer the parties to the tribunal [sect. 34].

Section 9 of the Criminal Procedure Code, 1898, provides that nothing therein contained should be held to give a Police Court summary jurisdiction to hear or determine any suit or prosecution for or in respect of any offence over which any Village Tribunal has exclusive jurisdiction under any special law.

Ordinance No. 24 of 1889 was amended as to certain matters not touching the jurisdiction of Village Tribunals by Ordinances No. 19 of 1893 and No. 9 of 1894.

Ordinance No. 9 of 1896 [sect. 4] gave power to Village Committees to take cognizance under the provisions of "The Cattle Trespass Ordinance, 1876," of any case of trespass by animals, and to award and impose the full amount of the damages, charges, and penalties payable under sections 7, 8, and 9 of that Ordinance; and Ordinance No. 15 of 1896 vested in Presidents of Village Tribunals within the limits of their territorial jurisdictions the powers of Inquirers into Crime under that Ordinance.

Cognizance
by Village
Committees
of cases of
cattle
trespass.

Presidents
of Village
Tribunals
to be
Inquirers
into Crime

Special
juries.

To revert to the courts established by Ordinance No. 11 of 1868—Ordinance No. 20 of 1871 provided for the summoning of special jurors to try criminal cases before the Supreme Court; Ordinance No. 10 of 1872 empowered Police Courts to try breaches of rules made by Village Communities; Ordinance No. 16 of 1880 provided for the appointment of a Commissioner to hold criminal sessions of the Supreme Court; and Ordinance No. 3 of 1883 [the Criminal Procedure Code] regulated the procedure of the Courts of Criminal Judicature in the Island.

Commissioner
of Assize.

Further
Ordinances
touching
adminis-
tration of
justice.

Ordinance No. 14 of 1885 removed doubts as to the jurisdiction of Court of Requests in partition suits.

Ordinance No. 18 of 1887 made special provision for the administration of justice in the North-Western Province, empowering the Governor to appoint a Police Magistrate for that Province, and giving the Magistrate so appointed jurisdiction to sentence persons above the age of sixteen years convicted of theft of cattle to be whipped.

Ordinance No. 1 of 1889 [the Courts Ordinance] consolidated and amended the laws relating to the constitution, jurisdiction, and powers of the courts for the administration of justice in this Colony; and this is at present the principal Ordinance relating to the jurisdiction of the different courts in this Island.

Ordinance No. 12 of 1890 provided that a Police Court may be holden by and before the Police Magistrate appointed thereto at any convenient spot within the limits of his division.

Ordinance No. 2 of 1891, amended by Ordinance No. 15 of 1893, declared [sect. 2] the Supreme Court a Colonial Court of Admiralty; gave District Courts Admiralty jurisdiction in certain causes [sect. 4]; and in other respects amended the law respecting the exercise of Admiralty jurisdiction in this Colony.

Ordinance No. 4 of 1891 empowered Police Magistrates to inflict whipping for theft of prædial products; and Ordinances No. 5 of 1886, 1 of 1888, 22 of 1890, 27 of 1892, 8 of 1896, and 5 of 1897 amended in certain respects the Criminal Procedure Code of 1888; and, finally, as regards Criminal Courts, Ordinance No. 15 of 1898 consolidated and amended their procedure.

As observed before, "The Courts Ordinance, 1889," is now the principal Ordinance relating to courts and their powers and jurisdictions. We shall proceed presently to examine in detail its provisions.

"The Courts Ordinance, 1889."

Her Majesty, by Commission under the Great Seal, may empower the Admiralty to establish in Ceylon any Vice-Admiralty Court or Courts [53 & 54 Vict. c. 27,* sect. 9 (1)], but only with jurisdiction with respect to prize, Her Majesty's Navy, the slave trade, the matters dealt with by the Foreign Enlistment Act, 1870, the Pacific Islanders' Protection Acts, 1872 and 1875, or to matters in which questions arise relating to treaties or conventions with foreign countries, or to international law [sect. 9 (2a)]. Any such court may be abolished by the Admiralty on the direction of Her Majesty by Commission under the Great Seal, and thereupon the jurisdiction of any Colonial Court of Admiralty in such possession which was previously suspended shall be revived [sect. 9 (4)].

Vice-Admiralty Courts are not Courts of Record [*Smith v. Nicolls*, 7 Se. 147; 5 B. N. C. 208; *per Tindal*, C. J.]. But in the Colonies they exercise the same jurisdiction as the High Court of Admiralty, with one exception; that is, when particular powers are conferred upon the High Court by name, and not upon the Vice-Admiralty Courts [the Rajah of Cochin, Swa, p. 475. *cf. Lapraik v. Burrows*, 13 Moo. P. C. C. 132].

* The Colonial Courts of Admiralty Act, 1890.

Colonial
Courts of
Admiralty.

By section 3 of the Act referred to above the Legislature of a British possession may by any Colonial law—

(a) declare any court of unlimited civil jurisdiction, whether original or appellate, in that possession, to be a Colonial Court of Admiralty, and provide for the exercise by such court of its jurisdiction under the said Act, and limit, territorially or otherwise, the extent of such jurisdiction ; and

(b) confer upon any inferior or subordinate court in that possession such partial or limited Admiralty jurisdiction under such regulations, and with such appeal, if any, as may seem fit : Provided that any such Colonial law shall not confer any jurisdiction which is not by the said Act conferred upon a Colonial Court of Admiralty.

The Supreme
Court a
Colonial
Court of
Admiralty.

In pursuance of these provisions, by Ordinance No. 2 of 1891,* the Supreme Court was declared a "Colonial Court of Admiralty." As such it has jurisdiction, subject to the provisions and limitations contained in the English Act, over the like places, persons, matters, and things as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and it may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and is to have the same regard as that court to international law and the comity of nations [sect. 2 of Ordinance No. 2 of 1891].

Admiralty
jurisdiction
of District
Courts.

The Governor in Executive Council may, by Proclamation, appoint any District Court to have Admiralty jurisdiction, and assign to such court as its district for Admiralty purposes any part or parts of any one or more district or districts; and the district so constituted with the parts of the sea, if any, adjacent thereto to a distance of three miles from the shore thereof, is to be deemed its district for Admiralty purposes. The Judge

* Proclaimed on 1st March, 1892.

and all officers of the court are to have jurisdiction and authority for these purposes throughout that district as if it was the district of the court for all purposes ; and, from a time to be specified in the Proclamation, the Ordinance is to have effect in and throughout the district so constituted. The Proclamation may from time to time be varied as may seem expedient, and a District Court appointed to have Admiralty jurisdiction as aforesaid, and no other District Court is for the purposes of the Ordinance to be deemed a District Court having Admiralty jurisdiction [sect. 3].

A District Court having Admiralty jurisdiction is to have jurisdiction, and all powers and authorities relating thereto, to try and determine the following causes [sect. 4] :—

(1) As to any claim for salvage in any cause in which the value of the property saved does not exceed ten thousand rupees, or in which the amount claimed does not exceed three thousand rupees.

(2) As to any claim for towage, necessities, or wages in any cause in which the amount claimed does not exceed one thousand and five hundred rupees.

(3) As to any claim for damage to cargo or damage to ships by collision or otherwise, or damage done by any ship, in any cause in which the amount claimed does not exceed three thousand rupees.

(4) Any cause in respect of any such claim or claims as aforesaid, but in which the value of property saved or the amount claimed is beyond the amount limited as above mentioned, when the parties agree by a memorandum signed by them or by their attorneys or recognised agents that any District Court having Admiralty jurisdiction and specified in the memorandum shall have jurisdiction.

The Ordinance makes provision for the transfer of cases, the procedure of the courts, the summoning of assessors, and [in amendment by Ordinance No. 15 of

1893] the framing of rules by the Judges of the Supreme Court regulating the practice, including fees, costs, &c., and by section 23 conserves the rules in force under "The Vice-Admiralty Courts Act, 1863,"* until the framing of new rules.

Inquiry into
shipping
casualties, &c.

Courts in British possessions, authorised by the Legislative authority thereof to inquire into charges of incompetency or misconduct on the part of officers of ships or as to shipwrecks or other shipping casualties, are invested with jurisdiction to inquire into similar charges in certain cases occurring *outside* the limits of those possessions [45 & 46 Vict. c. 76].

The Courts
Ordinance,
1889.

"The Courts Ordinance, 1889," came into operation, by Proclamation published in the *Government Gazette*, on the 1st August, 1890.

Repeal.

Section 2 of the Ordinance provides for the repeal of the Ordinances, sections of Ordinances, and Rules of Court mentioned in the first schedule to the Ordinance. Such repeal is not to restore any jurisdiction or form of procedure not existing at the date of the Proclamation of the Ordinance, or prejudice anything done or suffered, or any legal proceeding commenced or penalty incurred before such repeal took effect. Where an unrepealed Ordinance incorporated or referred to any provision of any Ordinance repealed by "The Courts Ordinance," such unrepealed Ordinance is to be deemed to incorporate or refer to the corresponding provision of "The Courts Ordinance."

Courts for
the ordinary
adminis-
tration of
justice.

The courts for the ordinary administration of justice are: (1) the Supreme Court, (2) District Courts, (3) Courts of Requests, and (4) Police Courts. The Ordinance does not affect the jurisdiction of any court constituted by an Imperial Statute or local Ordinance, except so far as such Statute or Ordinance is expressly repealed or modified by it; nor does it affect the

* For these rules see *Government Gazette* of 7th December, 1883

jurisdiction of any court constituted by statute for the trial of offences committed on the seas, or within the jurisdiction of the Admiralty, or under any Commission from the Lord High Admiral of England or the Commissioners for executing his office; nor the jurisdiction of Village Tribunals, Committees, or Councils, or of any Municipal Magistrate, or any special officer or tribunal legally constituted for any special purpose, or to try any special case or class of cases [sect. 4].

It may here be mentioned that Colonial Courts have jurisdiction to deal with charges of treason, piracy, felony, robbery, murder, conspiracy, or any other offence committed on the sea or in any place within Admiralty jurisdiction, whether the accused is within the Colony or is brought for trial to the Colony, in the same way as provided by the laws of the respective Colonies in the case of such offences committed, and persons charged with committing them, on waters within the limits of the respective Colonies and of the local jurisdictions of the Criminal Courts thereof [12 & 13 Vict. c. 96, sect. 1]. But only such penalties can be awarded as if the offence had been committed within the local limits of the particular Colony and the local jurisdiction, or as most nearly correspond to the penalty due in England for such offence [37 & 38 Vict. c. 27, sect. 3. This Act was passed in consequence of *Regina v. Mount*, 6 P. C. 283]. And if any person die in any Colony of injuries feloniously caused upon the sea, or as above, every offence in respect of any such case, whether murder, manslaughter, or being accessory to murder or manslaughter, may be dealt with and punished within the Colony as if it had been wholly committed within the Colony; and if any person within any Colony be charged with any such offence respecting the death on the sea, or as above, of any person feloniously injured, such offence is to be

Jurisdiction
of Colonial
Courts to deal
with certain
offences
committed on
the high seas.

held to have been wholly committed upon the sea [12 & 13 Viet. 96, sect. 3].

Division of
the Island
into circuits,
districts, and
divisions.

For the purposes of the administration of justice the Island is divided into four circuits, and each circuit comprises several districts and is divided into several divisions. The Governor may, with the concurrence of the Judges of the Supreme Court or a major part of them, by Proclamation, revoke, alter, or amend the division of the Island into circuits, and, with the like concurrence and the advice of the Executive Council, by Proclamation, revoke, alter, or amend the division of any circuit into districts and divisions, and alter the limits of any district or division [sect. 6].

Judges of
the Supreme
Court.

The Supreme Court is the only superior Court of Record, and consists of and is holden by and before three Judges, namely, one Chief Justice, who is called "The Chief Justice of the Island of Ceylon," and two Puisne Justices. Upon the death, resignation, sickness, or incapacity of any Judge, or in case of his absence from the Island, or his suspension from office, the Supreme Court consists of and is holden by and before the two remaining Judges until the vacancy is supplied. The two Judges may do every act or thing which the three Judges are empowered to do collectively, except hearing in review of any case preliminary to an appeal to Her Majesty in her Privy Council. If the two remaining Judges disagree in opinion in any case, it is reserved for decision when three Judges are present [sect. 8].

Judges how
appointed.

The Judges are appointed by Letters Patent under the Public Seal of the Island issued in pursuance of Warrants from Her Majesty. They hold office during Her Majesty's pleasure [sect. 9].

Governor
appoints
provisionally.

Upon the death, resignation, sickness, incapacity, absence from the Island, or suspension from office of a Judge of the Supreme Court, the Governor, by Letters Patent under the Public Seal, appoints a substitute until the vacancy is duly supplied [sect. 10].

It would appear from the case of *Gahan v. Lafitte* [3 Moo. P. C. C. 382] that if any person exercise the office of a Judge of the Supreme Court under a Commission issued irregularly by the Governor, he may be held liable in an action for trespass and false imprisonment for acts done by him in his assumed judicial capacity.

Judges acting on Commissions irregularly issued.

The Governor, upon proof of misconduct or incapacity of a Judge of the Supreme Court, may, with the advice of the Executive Council, suspend him as provided for in the Charter of 1833. He must, however, report immediately for the information of Her Majesty, through one of her Principal Secretaries of State, the grounds and causes of such suspension, and enter a statement on the minutes of the Executive Council of the grounds of such proceeding, and transmit to the Judge a full copy of the minutes and evidence, together with the order of suspension [sect. 11].

Governor when authorised to suspend.

The Chief Justice takes precedence before all persons except the Governor and Lieutenant-Governor and such persons as by law or usage in England take place before the Chief Justice of England. The Puisne Justices have precedence before all persons except the Governor, Lieutenant-Governor, the Chief Justice, the Officer Commanding Her Majesty's Forces in Ceylon, and the Bishop of Colombo, and such persons as by law or usage take place before the Puisne Judges of the High Court of Justice in England. Between themselves the Puisne Judges take precedence according to the priority of their respective appointments [sect. 12].

Rank and precedence of the Judges.

The Supreme Court has and uses a seal bearing a device and impression of the royal arms, with an exergue or label surrounding the same, with the inscription, "The Seal of the Supreme Court of the Island of Ceylon." The seal is kept with the Chief Justice, with liberty to deliver the same to any Puisne Justice or the Registrar for any temporary purpose. In case

Seal of the Supreme Court and the custody thereof.

of the vacancy of or suspension from the office of Chief Justice the seal is delivered over to, and kept in the custody of, such person as is appointed by the Governor to act as and in the place and stead of the Chief Justice [sect. 13].

Judges
incapable of
holding other
offices of
profit.

Neither the Chief Justice nor a Puisne Justice can accept, take, or perform any other office or place of profit or emolument within the Island. The acceptance of such other office or place is *ipso facto* an avoidance of his office of Chief Justice or Puisne Justice, and the salary of the latter office ceases from the time of such acceptance. The Chief Justice or a Puisne Justice may however accept, without being liable to any forfeiture, the office of Judge of the Court of Vice-Admiralty in the Island or of Commissioner for the trial and adjudication of prize causes and other maritime questions arising in India [sect. 14].

Ministerial
officers of the
Court.
Their
number how
to be
determined.

An officer styled the Registrar and Keeper of Records of the Court, and so many other officers as have appeared to the Chief Justice for the time being to be necessary for the administration of justice and the due execution of the powers and authorities granted and committed to the Supreme Court, are attached and belong to the said court. No office can, however, be created in the said court unless the Governor signify in writing under his hand his approbation thereof to the Chief Justice [sect. 15].

Ministerial
officers, how
appointed.

The subordinate officers of the Supreme Court are appointed to their offices by Her Majesty or by the Governor on her behalf. Every person attached to or holding any office in the said court as Clerk or as Private Secretary to any of the Judges thereof is appointed to such office by the Judge whom such person serves in such capacity. No person holding the office of Clerk or Private Secretary to any Judge is allowed to plead or practice as an Advocate or Proctor in the Supreme Court [sect. 16].

The several officers of the Supreme Court hold their respective offices during pleasure, and perform their respective duties under and subject to the direction and control of the Supreme Court. They are subject to be suspended from their offices for misconduct or other sufficient cause until the pleasure of Her Majesty or of the Governor on her behalf is ascertained and made known [sect. 17].

They hold office during pleasure.

Subject to the rules set out in the third schedule to the Courts Ordinance, the Supreme Court has power to admit and enrol as Advocates or Proctors persons of good repute and competent knowledge and ability [sect. 18].

Admission of Advocates and Proctors, their suspension and dis-enrolment.

In Ceylon Advocates and Proctors have always been admitted by the Supreme Court.

There is no express law whereby the Supreme Court is compellable to admit and enrol Proctors, or the Council of Legal Education is compellable to permit any one to submit himself for examination with a view of obtaining a certificate of qualification to enable him to apply to the Supreme Court to be enrolled as a Proctor. The Council have vested in them a jurisdiction to control the education of candidates, and the Supreme Court will not interfere with that discretion, unless it is most unreasonably exercised. It is not unreasonable for the Council to pass a general resolution restricting the number of examinations for which a candidate may enter [*In re the Application of Salgado, a law student, for a rule on the Council of Legal Education*, 1 S. C. R. 189].

It may here be noted that a person enrolled as a Proctor of one District Court, but who is desirous of practising in another, should not apply for a transfer of his warrant to the latter court, but for admission as Proctor of such court [*In the matter of the Petition of Kristnaratne*, 3 N. L. R. 202].

Under sections 2 and 3 of the Rules of the 31st March, 1870, solicitors admitted by the High Courts in India

or the corresponding courts in the Colonies can be admitted to practise in the Privy Council. The Judicial Committee have no power to extend at their discretion the class of those eligible [*In re Twidale's Petition*, 14 App. Cas. 328].

By the Colonial Attorney's Relief Act [20 & 21 Vict. c. 39, amended by 37 & 38 Vict. c. 41, 36 & 37 Vict. c. 66, and 47 & 48 Vict. c. 24] Attorneys and Solicitors of Colonies to which Her Majesty has by Order in Council extended its operation may be admitted to practise in Her Majesty's Superior Courts of Law and Equity in England.

Powers of
Supreme
Court to
refuse to
admit, and to
suspend or
remove them.

When the Supreme Court refuses to admit any person as an Advocate or Proctor, the Judges, if required so to do by the applicant, should declare in open court the reasons of refusal. No person not duly admitted and enrolled should be allowed to appear, plead, or act in the Supreme Court or any District Court on behalf of a suitor in such court. An Advocate or Proctor guilty of any deceit, mal-practice, crime, or offence may be suspended from practice or removed from office by the Judges of the Supreme Court, collectively. Such Advocate or Proctor may, however, be suspended by any Judge of the Supreme Court upon such cause as aforesaid. Before an Advocate or Proctor is suspended or removed, a notice containing a copy of the charges against him, and calling upon him to show cause against suspension or removal, as the case may be, must be personally served on him. If personal service cannot be effected, the Supreme Court may order such substituted service as it may deem fit. The provisions of Ordinance No. 12 of 1848, so far as they are not inconsistent with the Courts Ordinance, remain in full force and operation [sect. 19].

The power of suspending from practice is incidental to that of admitting to practise [see *In re the Justices of the Common Pleas at Antigua*, 1 Knapp 267; *Bunny v. Judges of New Zealand*, 15 Moo. P. C. C. 164].

Disbarring and striking off the rolls are not appropriate punishments for contempt of court; and a petition against such an order as well as against other inappropriate punishments will be entertained by the Judicial Committee of the Privy Council [*Smith v. The Justices of Sierra Leone*, 3 Moo. P. C. C. 361; *In re Downie and Arrindell*, 3 Moo. P. C. C. 414, as explained in *McDermott v. Judges of British Guiana*, L. R. 2 P. C. 341]. Thus, where a practitioner was suspended from practice for addressing, in his private capacity as a suitor, a letter to a Chief Justice, it was held that that was a mode of punishment not appropriate to the offence [*In re Wallace*, L. R. 1 P. C. 283].

When an order suspending from practice is made upon grounds unsupported by evidence [*In re Monckton*, 1 Moo. P. C. C. 455], or without notice to the person concerned, or upon insufficient grounds [*Smith v. Justices of Sierra Leone*, 7 Moo. P. C. C. 174], or without giving time to prepare the defence [*Emerson v. Judges of Supreme Court of Newfoundland*, 8 Moo. P. C. C. 157], the Judicial Committee on appeal will rescind it.

Where an order fining a Barrister of the Supreme Court of a Colony for contempt for disrespectfully addressing the Chief Justice while conducting a cause before him had been made without notice of the alleged contempt or rule to show cause, and without the appellant being heard in defence, the Judicial Committee reported to Her Majesty that in their judgment no person should be punished for contempt of court, which was a criminal offence, unless the criminal offence charged against him was distinctly stated, and an opportunity of answering it given him; that they were not satisfied that the offence for which the sentence was received amounted to a contempt of court or was legally an offence, and they recommended that the fine should be remitted [*In re Pollard*, L. R. 2 P. C. 106].

Where a fine for contempt is imposed, the remedy is to petition the Crown for a reference to the Judicial Committee under 3 and 4 Will. 4, c. 41, sect. 4 [see *In re Ramsay*, L. R. 3 P. C. 427].

Power to
appoint
Commis-
sioners of
Oaths.

The Supreme Court may, under its seal, appoint for any district one or more persons, to be styled "Commissioners to administer Oaths," to administer oaths for the purpose mentioned in section 183 of the Civil Procedure Code; and the court may, at its discretion, cancel any such appointment [sect. 20].

The Supreme Court exercises—

Jurisdiction
and powers
of Supreme
Court.

(1) An original criminal jurisdiction for the inquiry into all crimes and offences committed throughout the Island, and for hearing, trying, and determining all prosecutions and charges commenced, and all indictments and informations presented therein against any person for or in respect of any such crimes or offences, or alleged crimes or offences;

(2) An Appellate jurisdiction for the correction of all such errors as are hereinafter specified, committed by any original court, and sole and exclusive cognizance by way of appeal and revision of all causes, suits, actions, prosecutions, matters, and things of which such original court may have taken cognizance [sect. 21].

Power to
grant
injunctions.

The Supreme Court or one of its Judges has the power to grant and issue injunctions to prevent any irremediable mischief which might ensue before the applicant for such injunction could prevent the same by bringing an action in any original court. The Supreme Court or a Judge cannot, however, grant an injunction to prevent a party to any action in any court from appealing or prosecuting an appeal to any Court of Appeal, or to prevent any party to any action in any original court or in any Court of Appeal from insisting upon any ground of action, defence, or appeal, or to prevent any person from suing or prosecuting an action

in any court, except where such person has instituted two separate actions in different courts for and in respect of the same cause of action. In this case the Supreme Court may by injunction restrain him from prosecuting one or the other of such actions as to it may seem fit [sect. 22].

There is no inherent power in the Supreme Court to issue injunctions. Its jurisdiction to do so is restricted to the cases referred to in this section ; and the special circumstances in which such jurisdiction is to be exercised are : (1) that irremediable mischief would ensue from the act sought to be restrained ; (2) that an action would lie for an injunction in some court of original jurisdiction ; and (3) that the plaintiff is prevented by some substantial cause from applying to that court [*Mahamado v. Ibrahim*, 2 N. L. R. 36].

Subject to the limitations in the Courts Ordinance or any other Ordinance for the time being in force prescribed, the powers and functions of the Supreme Court may be exercised in different matters at the same time by the several Judges of the Court sitting apart [sect. 23].

Several jurisdictions may be exercised simultaneously by Judges sitting apart.

It would appear from the judgment of the Privy Council in *In re Wells* [3 Moo. P. C. C. 216] on a petition from Grenada, that the Chief Justice has no power, alone and without the consent of the Assistant Justices, to issue rules prohibiting the Assistant Justices from doing any act in chambers except in the case of absence from the Island, illness, or personal interest in the act of the Chief Justice.

Commissioners of Assize.

The Governor may, on representation by the Chief Justice that it is expedient that any criminal session of the Supreme Court should be held in any circuit otherwise than by one of its Judges, appoint, by Commission under the Public Seal of the Island, a Judicial Officer, to be called "The Commissioner of Assize," to

Appointment.

hold office for such period, and for such criminal session or part of a criminal session of the Supreme Court, as shall be specified in the Commission [sect. 24].

Rights,
powers,
privileges,
&c., of
Commissioner
of Assize.

The Commissioner has power to hold any criminal session or part thereof for which he is appointed to act. He has, during the continuance of the session or part thereof, all the rights, powers, privileges, and immunities of a Judge of the Supreme Court, and has rank and precedence immediately after the Puisne Judges of the Court [sect. 25].

Sessions held
before Com-
missioner.

Every criminal session or part thereof of the Supreme Court held before a Commissioner is to be deemed a criminal session of the court within the meaning of the Courts Ordinance and of the Criminal Procedure Code, and all the provisions of the Criminal Procedure Code or any Ordinance relating to criminal sessions of the Supreme Court apply to every criminal session or part thereof held by such Commissioner [sect. 26].

Original Criminal Jurisdiction.

Criminal
jurisdiction,
how to be
exercised.

The original criminal jurisdiction of the Supreme Court is exercised at criminal sessions held as prescribed in the Criminal Procedure Code and in section 31 of the Courts Ordinance [sect. 27].

Criminal
sessions,
when and
where holden.

Criminal sessions of the Supreme Court are held by one of the Judges or a Commissioner of Assize, for each of the circuits, for trying all prosecutions commenced against any person in respect of any crime or offence :—

For the Western Circuit, four times at least in each year in Colombo or at such other places in such circuit as the Governor, after consultation with the Judges, appoints. Such sessions commence in Colombo on the 10th January, the 20th March, the 10th July, and the 10th October every year.

For the Midland Circuit, three times at least at Kandy and at such other places in such circuit as the

Governor, after consultation with the Judges, appoints. Such sessions commence at Kandy on the 10th March, the 1st August, and the 1st December every year.

For the Northern circuit, twice at least at Jaffna and such other places in such circuit as the Governor, after consultation with the Judges, appoints. Such sessions commence at Jaffna in February and July every year.

For the Southern Circuit, twice at least at Galle and such other places in such circuit as the Governor, after consultation with the Judges, appoints. Such sessions commence at Galle on the 25th April and 15th September every year.

If any of the afore mentioned days fall on a Sunday or public holiday, the sessions commence on the day following. The Governor may, for sufficient reasons, order, after consultation with the Judges, other sessions to be held at the places above mentioned or at any other place in any of the said circuits, or alter the dates above mentioned, and fix any other date for the commencement of the sessions at any place [sect. 28].

The Chief Justice first chooses the circuit on which he intends to proceed. The second choice is made by the Senior Puisne Justice [sect. 29].

Choice of
circuits.

Every Judge of the Supreme Court, before or on holding a criminal session of the Supreme Court, must issue his mandate to all Fiscals and other keepers of prisons within the limits of the circuit for which the sessions are held, to certify to the Judge the several persons in their custody committed for and charged with any crimes or offences. The Fiscals or other keepers of prisons should certify and transmit due returns to such mandate by specifying in a calendar or list to be annexed to such mandate the time or times when the persons in their custody were committed and by whose authority, and on what charge and for what crime respectively, in writing: and, if need be, according

Judge to
issue a
mandate to
Fiscals and
Jailers to
return a
calendar of
prisoners.

Contents of
calendar.

Prisoners and witnesses to be brought before the Judge.

to the tenor of the mandate, bring the persons in their custody before the Judge holding the sessions, together with the witnesses for the prosecution and defence, whose attendance before the court is certified by the Magistrate as necessary on the back of the respective commitments. When, after the making out of the calendar or list and while the sessions are being held, any person is apprehended for, or committed on, any criminal charge, the Attorney-General may move the insertion of his name in the calendar or list [sect. 30].

Criminal sessions how held.
Proviso for case to be tried before Full Court.

Criminal sessions of the Supreme Court are held before a Judge and jury as provided for in the Criminal Procedure Code. The Chief Justice may in his discretion order and direct that any particular accused party committed for trial before the Supreme Court be tried before the Full Court in Colombo with a jury [sect. 31].

Objection to jurisdiction.

When an accused party has pleaded to an indictment, and it appears in evidence that the crime or offence with which he is charged was committed outside the limits of the circuit for which the session is being held, the Supreme Court should, nevertheless, proceed to try him as if the crime or offence was committed within the limits of such circuit [sect. 32].

Prisoner committed for trial before the Supreme Court must be brought to trial at first session thereof.

If a prisoner committed for trial before the Supreme Court is not brought to trial at the first criminal sessions after the date of his commitment at which he might properly be tried, the court should, if twenty-one days have elapsed between the date of the commitment and the first day of such sessions, admit him to bail, unless good cause is shown to the contrary, or unless the trial is postponed on the application of the prisoner. If he be not brought to trial at the second sessions after his commitment at which he might properly be tried, unless it be by reason of his insanity or sickness or his application for a postponement, the

When to be discharged if not brought to trial at

Judge should, unless good cause be shown to the contrary, order him to be discharged from imprisonment for the offence for which he stands committed, provided that six weeks at least should have elapsed since the close of the first sessions after the date of his commitment before the commencement of the second, and that six months at least should have elapsed between the date of the commitment and the commencement of the second sessions [sect. 33].

second
session after
commitment.

No person discharged from jail in consequence of not being brought to trial within the proper time can be re-committed to jail for the same offence ; and no person who has been admitted to bail to appear and take his trial, and who has not been duly brought to trial is, unless the bail bond or the money deposited instead of bail has been forfeited, obliged to find further bail or be subject to be committed to jail for the same offence in respect of which he was originally admitted to bail. Neither such discharge from imprisonment nor the expiration of the bail bond is, however, a bar to the person being brought to trial in any competent court for any offence for which he was originally committed to trial [sect. 34].

When
discharged
not to be
re-committed
for same
offence.

But may be
brought to
trial.

Whenever the Attorney-General desires to put upon his trial any person not brought to trial as stated in section 34, he should make application to the court competent to try such person for a summons on him to appear and take his trial. The summons should be served personally upon him or left at his usual place of abode. If he fail to appear, he may be arrested without a warrant by any officer of the law or a private person and re-committed to jail for trial. Until so re-committed his property is liable to attachment as of a person who has absconded or fled from justice [sect. 35].

May be
summoned to
stand his
trial.

If the accused person commit any breach of his bail bond, and the court thereupon direct the fact to be

Proceedings
where party
does not

appear on
recognisance
to take his
trial.

entered on the minutes, the bail bond or the money deposited instead of bail becomes forfeited ; and proceedings may be taken for recovery of the amount of the bond. Where, however, the accused has become bound to appear at any session of the Supreme Court, if at any time before the close of the session he appears and satisfactorily excuses his neglect, the court may direct the forfeiture of the bail or deposit to be discharged upon such terms as are just [sect. 36].

Recognisance
of accused
parties and
witnesses
may be
respited.

Where a person charged with any crime or offence has entered into a bond to appear and take his trial, or where a person has entered into a bond to appear and give evidence at the trial of any person, and the court before which either person is to appear postpones the trial, it may order the bond and the obligation of the sureties, if any, under it to be respited and enlarged until such time as it shall appoint [sect. 37].

Twenty years
a bar to
prosecution
excepting in
murder and
treason.

The right of prosecution for murder or treason is not barred by any lapse of time ; but the right of prosecution for any other crime or offence, except those for which special provision is made by Ordinance, is barred by the lapse of twenty years from the date of the commission of any such crime or offence [sect. 38].

Appellate Jurisdiction.

Appellate
jurisdiction,
where
exercised.
Extent of.

The Appellate jurisdiction of the Supreme Court is ordinarily exercised only in Colombo. Subject to the provisions of the Criminal Procedure Code, such jurisdiction extends to the correction of all errors in fact or in law committed by a Judge of the Supreme Court sitting alone as hereafter stated, and to the correction of all errors in fact or in law committed by District Courts, Courts of Requests (if in final judgments or orders having the effect of final judgments*), Police

* An order is final only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely, it is interlocutory where it cannot be affirmed that in

Courts, and Courts of Municipal Magistrates. No judgment, sentence, or order of any court should on appeal or revision be reversed, altered, or amended on account of any error, defect, or irregularity which has not prejudiced the substantial rights of either party [sect. 39].

Even if a decree were irregular by reason of its having been signed by the Judge who wrote it and not by him who delivered it, the irregularity would be cured by this section [576 Test., D. C., Kurunegala; S. C. Civ. Min. 5th March, 1898].

In appeal or on revision the Supreme Court may, subject to the provisions of section 39 and of the Criminal Procedure Code, affirm, reverse, correct, or modify any judgment, sentence, decree, or order according to law, or pass such judgment, sentence, decree, or order, or give such direction to the court below as it thinks fit, or may order a new trial or a further hearing upon such terms as it thinks fit; or, if need be, the Supreme Court may receive and admit new evidence additional to, or supplementary of, the evidence already taken in the court of first instance touching the matters at issue in any original cause, suit, prosecution, or action, as justice may require.

Powers in
appeal and in
revision.

If the Supreme Court in Colombo sees fit to order such new evidence to be taken on circuit, a single Judge on circuit may take such evidence and hear and

New evidence
to be taken
on circuit.

either event the action will be determined [*Salman v. Warner*, 1 Q. B. D. (1891), p. 734.] "Interlocutory" means that which is decided in the course of the action or suit, and does not determine it; intermediate, not finally determined [*Wharton*, Law. Lex.].

To constitute an order a final judgment nothing more is necessary than that there should be a *litis contestatio* and a final adjudication between the parties to it on the merits. It is a judgment obtained in an action by

which the question whether there was a pre-existing right in the plaintiff against the defendant is finally determined in favour of either the plaintiff or the defendant. Nothing can be a final judgment by which there is not a final and conclusive adjudication between the parties of the matters in controversy in the action. It is a final adjudication of the matters in contest in the action [*e. p. Strathmore*, 20 Q. B. D. (1888), pp. 320 and 512].

Appeal.

determine the matter under appeal or revision, and his decision will be deemed and taken to be the judgment of the Supreme Court thereon. In any case, however, in which the presence of two or more Judges is required for the final determination of any such matter, the decision of such Judge sitting alone on circuit is not final, but is subject to appeal to the Supreme Court. The procedure on such appeal is the same as that for appeals for the hearing of which the presence of two or more Judges is necessary [sect. 40].

The Supreme Court may alter its own decree for error on the face of it, or new matter subsequently discovered, or fraud [*Carlill & Co. v. Rawter*, 1 Tamb. Rep. 18].

If a *prima facie* case is made out to the satisfaction of the Supreme Court that a judgment is fraudulent and ought to be rescinded, the Supreme Court, exercising full powers of revision, would remit the case to the Judge who pronounced the decree directing him to rescind it or affirm it after a further hearing. The procedure in such cases is an application, supported by affidavits, to the Supreme Court for an order to the Judge of the court below to review the decision said to have been obtained by fraud [*Gooneratne v. Dingiri*, 1 Tamb. Rep. 29].

“Costs of appeal,” when awarded to either party, include costs incurred in the court below for the purpose of forwarding the appeal to the Supreme Court. These costs the taxing officer of the court below is competent to deal with [*Dingirihami v. Kalu Menika*, 2 C. L. R. 154].

Appeals from
single Judges
of the
Supreme
Court and
from District
Courts and
Courts of
Requests.

Appeals in civil cases from the decision of a single Judge sitting as provided in section 40, and from judgments and orders of District Courts, are heard before two at least of the Judges of the Supreme Court. Appeals from judgments in criminal cases in District Courts and from Courts of Requests and Police Courts may be heard by any one Judge of the Supreme Court.

In the event of any difference of opinion between two Judges, the decision of the court is suspended until all the three Judges are present. The decision of two Judges when unanimous, or of the majority of the three Judges in case of any difference of opinion, is deemed and taken to be the judgment of the Supreme Court. Appeals from the decision of one Judge of the Supreme Court sitting as provided in section 40 are heard by the other two Judges, and their decision, when unanimous, is deemed to be the judgment of the Supreme Court. In case of difference of opinion the original judgment stands affirmed.

Any Judge of the Supreme Court sitting alone in appeal may reserve any appeal for the decision of two or more Judges [sect. 41].

The Crown now exercises its prerogative to receive appeals from the Colonies through the Judicial Committee of the Privy Council, which is the Court of Appeal in England from the Colonies [3 & 4 Will. 4, c. 41, sect. 2; and see 6 & 7 Vict. c. 38, sects. 4, 6, 8, 13, 16 repealed, and the portions of sect. 11 referring to Vice-Admiralty Courts; 7 & 8 Vict. c. 69], except in cases under the Merchant Shipping (Colonial Inquiries) Act, 1882 [45 & 46 Vict. c. 76], by which an appeal lies from the Colonial tribunal to the Probate, Divorce, and Admiralty Division of Her Majesty's High Court of Justice in England [*id.* sect. 6].

Appeals to
Privy
Council.

The Judicial Committee of the Privy Council consists of the Lord President of the Privy Council, the Lord High Chancellor of Great Britain, all Privy Councillors who hold or have held any of the offices of Lord of Appeal in Ordinary, Lord Chief Justice of England, Master of the Rolls, Lord Justice of the Court of Appeal, Judge of any of the late Courts of Queen's Bench, Common Pleas, Exchequer, Probate, or Admiralty, or of Chief Judge in Bankruptcy, all past Presidents of the Council, and Lord Chancellors,

The Judicial
Committee of
the Privy
Council.

together with any two others whom Her Majesty shall think fit to appoint from time to time on the Committee [see 3 & 4 Will. 4, c. 41, sect. 1; 37 & 38 Vict. c. 35, sched., as to 3 and 4 Will. 4, c. 41; 20 & 21 Vict. c. 77, sect. 115; 39 & 40 Vict. c. 59, sects. 6, 14; 44 Vict. c. 3], and such members of Her Majesty's Privy Council as are for the time being holding or have held any of the offices which in the Appellate Jurisdiction Acts, 1876 and 1887, are described as high judicial offices [3 & 4 Will. 4, c. 41, sect. 5]. These offices are those of Lord Chancellor of Great Britain or Ireland, or of paid Judge of the Judicial Committee of the Privy Council, or of Judge of one of Her Majesty's Superior Courts of Great Britain and Ireland, or of Lord of Appeal in Ordinary, or of Member of the Judicial Committee of the Privy Council.

Her Majesty may also summon other Privy Counsellors to the Committee [3 & 4 Will. 4, c. 41, sect. 5]. By 34 & 35 Vict., c. 91, power was given to Her Majesty to appoint four paid members within twelve months, who had been either Judges of a Superior Court at Westminster or Chief Justices of the High Court of Judicature at Fort William, Madras, or Bombay, or of the late Supreme Court of Judicature at Fort William. Three members of the Committee form a *quorum* [15 & 16 Vict. c. 83, sect. 16].

Appeal to Her Majesty in Privy Council.

The right of appeal to Her Majesty in Her Privy Council granted by the Royal Charter of 1833 to parties to any civil suit depending in the Supreme Court against any final judgment, order, or sentence, or any rule or order made in such suit having the effect of a final sentence, is not affected by the Courts Ordinance. Such appeal continues to be subject to the rules and limitations prescribed by the said Charter, which are as follow [sect. 42] :—

(1) The judgment or order from which an appeal is intended must be brought by way of review before the Judges of the Supreme Court collectively holding general sessions in Colombo. The Judges should, by rules and orders to be by them framed as hereafter stated, regulate the form and manner of proceeding to be observed in bringing such judgment or order in review. The judgment of the majority of the Judges is to be taken and recorded as the judgment of the Court collectively.

Case to be heard by Full Court in review.

The above rule is the same as the first under section 52 of Ordinance No. 11 of 1868, and under that section it was held in *The Chartered Mercantile Bank v. Sada-yappa* [9 S. C. C. 80] that upon review of a judgment of the Supreme Court preparatory to an appeal to Her Majesty in Council the Court can only reconsider its judgment on the materials originally before it, and cannot set aside that judgment and order a new trial on the ground of discovery of fresh evidence.

(2) The judgment or order from which an appeal to Her Majesty is sought must be one pronounced for or in respect of a sum or matter at issue above the amount or value of five thousand rupees, or involving, directly or indirectly, the title to property or to some civil right exceeding the value of five thousand rupees.

Amount in respect of which appeal may be taken.

There is no appeal to the Privy Council from a judgment in an action in which the plaintiff claims, as against one of the defendants, a decree of divorce *a vinculo matrimonii* on the ground of her adultery with the co-defendants, but claims no damages against the latter [*Le Mesurier v. Le Mesurier* 3 S. C. R. 37; 3 C. L. R. 45].

Where the nature of the property did not appear on the proceedings, the Supreme Court, previous to sitting in review, ordered the District Court to ascertain by Commission or other satisfactory means the value of such property, and report the same to the Supreme Court [646 D. C., Kandy; Morg. Dig. 57].

The word "title," as used in this sub-section, refers generally to any right to any property, whether movable or immovable, and not simply the absolute right to immovable property. Where, in a possessory action, the value of the land regarding which the action is brought is above Rs. 5,000, a judgment, decree, sentence, or order in such action comes within the provisions of this sub-section; and an appeal from such judgment, decree, sentence, or order lies to Her Majesty in her Privy Council, and the party desiring to appeal is entitled to a certificate under section 781 of the Civil Procedure Code [*The O. B. C. Estates Co. v. Brooks & Co.* (the St. Coombs' case) 1 S. C. R. 1].

A judgment whereby the Supreme Court held that the defendant in a case had infringed the plaintiff's patent and remitted the case for assessment of damages was held not to be a judgment of the description given in this sub-section [*Jackson v. Brown*, 1 S. C. R. 313; 2 C. L. R. 127].

The right of appeal given by the Inventions Ordinance is now governed by this sub-section [*ibid*].

The limitations as to finality and value imposed by the provision in this section apply as well to the original judgment of the Supreme Court as to that pronounced in review [*ibid*].

Under this section the value of the subject-matter of the suit is to be determined by the statement in the plaint, whether proved or not. So, where in an action to restrain the defendant from trading under a certain name and to recover Rs. 9,000 as damages consequent upon the use of such name, no value was assigned in the plaint to the use of such name, and no issue relating to damages was framed, nor any attempt made to prove damage at the trial, and the dismissal of the plaintiff's case was affirmed by the Supreme Court—held, that the plaintiff is entitled to a certificate under

section 781 of the Code [*Delmege v. Delmege*, 1 N. L. R. 271].

The measure of value for determining a plaintiff's right of appeal is the amount for which the defendant has successfully resisted a decree. Mesne profits, if demanded in the plaint, must enter into the calculation of the appealable value [*Mohideen Hadjiar v. Pitchay*, (1893) A. C. 193].

The costs of the suit should not be taken into consideration in estimating the amount in dispute [*Nilmadhub Dass v. Bishumber Dass*, 2 Suth. P. C. R. 257].

(3) The person feeling aggrieved by the judgment or order in review must within fourteen days apply, by petition, to the Supreme Court holding general sessions in Colombo, at which all the Judges are present and assisting, for leave to appeal to Her Majesty in her Privy Council.

Application
for leave to
appeal must
be within
fourteen
days.

The Supreme Court delivered a judgment on 22nd November, 1881, which did not pass the seal of the Court until 28th March, 1882. The appellant (plaintiff) filed his petition of appeal on the 8th April, and tendered his bond for security in appeal (the acceptance of which was unopposed) on 7th July, 1882—*Held*, that the period of fourteen days within which the petition of appeal had to be filed was to be reckoned from the date of the judgment sought to be appealed against passing the seal of the court, and not from the date of its delivery in court, and that therefore the petition was filed in time. *Held* also that the bond for security in appeal had been tendered within the three months of filing the petition of appeal, and was therefore in time [4,026, D. C., Kegalla, Wendt, 16].

(4) Where leave to appeal is prayed for by a party adjudged to pay a sum of money or to perform any duty, the judgment or order in review appealed from can be carried into execution only if the party respondent give security for the immediate performance of

Judgment
may be
executed on
security being
given for
restitution.

any judgment, &c., which may be pronounced by Her Majesty in her Privy Council. Until such security is given the execution of the judgment, &c., appealed from will be stayed.

Court may stay execution on appellant giving security.

(5) If the appellant, however, establish to the satisfaction of the Supreme Court that real and substantial justice requires that, pending appeal, execution should be stayed, the court may order execution to be stayed pending appeal, if the appellant give security for the immediate performance of the judgment, &c., of Her Majesty in her Privy Council.

Appellant must give security for prosecution of appeal and payment of costs.

(6) In all cases security must be given by the appellant for the prosecution of the appeal and for the payment of all such costs as may be awarded by Her Majesty.

Court to determine security. Security when not required in case of immovable property.

(7) The Supreme Court must, subject to the conditions hereafter mentioned, determine the nature, amount, and sufficiency of the several securities to be taken.

(8) Where the subject of litigation consists of immovable property, and the judgment or order does not affect its actual occupation, neither party need give security for the performance of the judgment in appeal. If the judgment or order affect the occupation of immovable property, the security must not be greater than may be necessary to secure the restitution, free from all damage or loss, of such property or of the profit which may accrue therefrom pending appeal.

Security in case of movable property.

(9) Where the subject of litigation consists of money or other chattels, or of any personal debt or demand, the security may be either a bond in the amount or value of the subject of litigation by one or more sufficient surety or sureties or by way of mortgage of some immovable property within the Island of the full value of the subject of litigation clear of all mortgages, &c., thereon.

Security for prosecution of appeal may

(10) The security to be given by the party appellant for the prosecution of the appeal and for payment of

costs need not exceed three thousand rupees, and may be given either by security or mortgage as aforesaid.

(11) Security to be given by the party appellant for the prosecution of the appeal and for the payment of such costs as may be awarded may be completed within three months from the date of the petition for leave to appeal. The Supreme Court should thereafter make an order allowing the appeal; and the party appellant may prosecute his appeal in such manner and under such rules as are observed in appeals to Her Majesty in her Privy Council from her Plantations or Colonies.

(12) Any person aggrieved by any order of the Supreme Court as to security may by petition apply to Her Majesty in her Privy Council for redress.

The provisions of the Courts Ordinance are not to be taken as abridging the right of Her Majesty to admit any appeal from a judgment or order of the Supreme Court, or the humble petition of any person aggrieved thereby in any case in which it may seem to her meet to admit such appeal or petition [sect. 42].

It is the settled prerogative of the Crown to receive appeals in Colonial cases [*In re Bishop of Natal*, 3 Moo. P. C. C. N. S. 156. As to appeals from Colonial Courts of Admiralty see 53 & 54 Vict. c. 27, s. 6]; but the inconvenience of entertaining appeals in cases of a strictly criminal character is so great, the obstruction that it would offer to the administration of justice in the Colonies is so obvious, that it is very rarely that applications of that character to the Judicial Committee have been attended with success [*Falkland Islands Co. v. Reg.*, 1 Moo. P. C. C. N. S. 312; approved in *In re Dillet*, 12 App. Cas. 459; cf. *In re Ames*, 3 Moo. P. C. C. 409; *Riel v. Reg.*, 10 App. Cas. 675]. Where, however, questions are raised of great and general importance, and likely to occur often; and where the due and orderly administration of the law has been interrupted or diverted into a new course, which might create a

not exceed
Rs. 3,000.
Appellant
may be
allowed three
months to
enter into
securities,

Application
against order
as to security.

Right of
admitting
appeals
without
reference to
these rules.

Appeals to the
Privy Council
in criminal
cases.

precedent for the future; and where there are no means of preventing those consequences, an appeal will be entertained by the Committee [*Reg. v. Bertrand*, L. R. 1 P. C. 520; *cf. Reg. v. Murphy*, L. R. 2 P. C. 35, 535; and see *Reg. v. Coote*, L. R. 4 P. C. 599; *In re McDermott*, L. R. 1 P. C. 260]. Her Majesty, however, will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done [*In re Dillet*, 12 App. Cas. 459].

And the granting of leave to appeal will not be advised in criminal cases where it is not even suggested or surmised that substantial injustice has been done either through a disregard of forms of legal process or by some violation of natural justice [*e. p. Deeming*, (1892) A. C. 422; *Kops v. Regina, e. p. Kops*, (1894) A. C. 650].

Although in very special and exceptional circumstances leave to appeal may be granted, misdirection by a Judge either in leaving a case to a jury where there is no evidence, or founded on misconstruction of a statute, is insufficient to ground an appeal, especially where no miscarriage of justice has resulted [*e. p. Macrea*, (1893) A. C. 346].

There is an indisposition on the part of the Judicial Committee of the Privy Council to interfere with the forms and practice of Colonial Courts [*Grant v. Etna Insurance Co.*, 15 Moo. P. C. C. 516].

Leave to appeal in cases outside the prescribed limit will be given for sufficient cause [*In re Marois*, 15 Moo. P. C. C. 189; *Cushing v. Dupuy*, 5 App. Cas. 409].

Special leave to appeal may be given on terms that the appellant should be liable to pay the respondent's costs in any event [*Montreal Gas Co. v. Cadieux*, (1898) A. C. 718].

Where an appeal is desired in a case in which the amount in dispute is less than the appealable value, or in which the time for presenting an appeal has expired, or proper security for costs has not been given, &c., a petition to Her Majesty in Council may be presented for special leave to appeal, which will be referred to the Judicial Committee for them to advise whether it should be granted or refused [Macph. Privy Council Pract.].

Appeals in cases under the prescribed limit.

A petition for special leave to appeal must state fully but succinctly the grounds upon which it is based, the record not being before their Lordships until forwarded by the proper authorities [*Canada Central Railway Co. v. Murray*, 8 App. Cas. 574].

When special leave to appeal has been given on an *ex parte* application and upon an erroneous statement contained in the petition for leave, the order allowing such leave will be discharged with costs [*Bulkeley v. Scutz*, L. R. 3 P. C. 196; and *cf. e. p. Baudanis* 13 App. Cas. 832].

When an appeal is allowed by the Supreme Court or by Her Majesty, the court, on the application and at the cost of the party appellant, should certify under its seal and transmit to Her Majesty a true and exact copy of all proceedings, &c., in the cause, so far as the same have relation to the matter of appeal [sect. 43].

Transcript of records to be forwarded to Privy Council.

The Judicial Committee has no jurisdiction to determine any matter litigated in an inferior court except on appeal from that court [*In re Nahon and Pariente*, 2 Knapp, 66; *In re Levien*, 10 Moo. P. C. C. 31; *In re Gould*, 2 Moo. P. C. C. 188]. But by section 4 of 3 & 4 Will. 4, c. 41, Her Majesty may refer to the Judicial Committee any such matter whatsoever other than appeals as Her Majesty shall think fit; and the Committee shall thereupon hear or consider the same, and shall advise Her Majesty thereon as in the case of regular appeals.

Matters not litigated in the inferior court.

Proceedings
generally in
appeals to
Privy
Council and
orders on
such appeals.

Where special leave to appeal has been granted on the ground that the appellant desires to raise a particular question of great and general importance, he cannot be permitted at the hearing to say that no such question arises, and to argue that the case turns upon a question of fact, on which the Court below was in error [*Corporation of St. John's v. Central Vermont Railway Co.*, 14 App. Cas. 590].

The Judicial Committee will not permit questions of fact to be raised which were abandoned or not taken in the court appealed from [*Council for the Borough of Randwick v. Australian Cities Investment Corp.*, (1893) A. C. 322, at p. 325]. Where charges of fraud and deceit have failed, the person making them will not be allowed to raise new issues as to negligence on appeal [(1892) A. C. 473].

Where a previous decision of the Judicial Committee has been given *ex parte*, although great weight is due to it, their Lordships are at liberty to examine the reasons upon which that decision was arrived at, and if they should find themselves forced to dissent from these reasons, to decide upon their own view of the law [*Tooth v. Power*, (1891) A. C. 292].

Their Lordships will consolidate appeals at any stage if it appears convenient that they should be heard together [*Hiddingh v. Denyssen*, 12 App. Cas. 107].

It is most desirable that Judges in the Colonies should always comply with the rule of the Judicial Committee of the 10th February, 1845, as to giving reasons for their judgments [*Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance Co.*, 12 App. Cas. 128. But as to notes of evidence see *Baudanis v. Liquidators of Jersey Banking Co.*, 13 App. Cas. 832]. Reasons given by a Judge of a court from which an appeal lies to the Privy Council ought to be stated publicly at the hearing and communicated to the Registrar of the Privy Council. Their Lordships will not

look at notes merely communicated to one of the parties [*Richer v. Voyer*, L. R. 5 P. C. 481; *Brown v. Gagy*, 2 Moo. P. C. C. N. S. 365].

Special leave to appeal in a case involving only an issue of fact will generally be refused [*Canada Central Ry. Co. v. Murray*, 8 App. Cas. 574; *Prince v. Gagnon*, *id.* 103].

In *Stanford v. Brunette* [14 Moo. P. C. C. 60] it was laid down that the record transmitted by the court below was alone to be looked at; and that short-hand writer's notes could not be received to impeach the Judge's notes.

The Judicial Committee is always extremely loth to send a case for re-trial, much more to decide it upon points which appear to have been raised for the first time at their Bar, and which may possibly have been treated as agreed upon or too clear for argument by the court below [*Mackay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 409; *Owners of S. S. Pleiades v. Owners of S. S. Jane*, (1891) A. C. 259].*

Where in an appeal to the Privy Council witnesses to facts requisite for the purpose of the judgment are in London, the Judicial Committee, instead of remitting the case, would make order to take evidence on commission in London [see *Bank of China, Japan, and the Straits v. American Trading Co.*, (1894) A. C. 266].

When a decision of the Judicial Committee has been reported to Her Majesty, and has been sanctioned and embodied in an Order in Council, it becomes the decree or order of the final Court of Appeal; and it is the duty of every subordinate tribunal to whom the order is addressed to carry it into execution [*Pitto v. La Fontaine*, 6 App. Cas. 482].

* As to disregard of technicalities of pleading by the Judicial Committee see also *Le Breton v. Ennis*, 4 Moo. P. C. C. 331;

Black v. Ottoman Bank, 15 Moo. P. C. C. 472; and *McLean v. McKay*, L. R. 5 P. C. 337.

Right of Crown with reference to appeal to Privy Council.

Apparently the Crown has no greater right than a subject to be let in to appeal in a general case in which its interests are concerned [*Laing v. Ingham*, 3 Moo. P. C. C. 26].

Supreme Court and original courts must execute judgments of Privy Council in appeal.

The Supreme Court and the original court from which the appeal was first taken should execute and carry into immediate effect such judgment or order as Her Majesty in Council might enter or make [sect. 44].

Powers conferred on Supreme Court by Royal Charter.

The Supreme Court has and enjoys all powers, privileges, and jurisdictions conferred upon it by the Charter of 1833 and by subsequent Charters, so far as the same are not inconsistent with the provisions of the Courts Ordinance or of the Civil Procedure Code [sect. 45].

General Provisions.

Supreme Court may inspect records, issue mandates, and transfer causes.

The Supreme Court or any Judge thereof has full power to inspect and examine the records of any court, and to issue, according to law, mandates in the nature of writs of *mandamus*, *certiorari*, *procedendo*, and *prohibition* against any District Judge, Commissioner, Magistrate, or other person or tribunal [sect. 46].

Mandamus.

The writ of *mandamus* is termed a high prerogative writ issuing in the Queen's name out of the Court of Queen's Bench* on special application made to it by motion. The writ commands those to whom it is directed to perform some specified duty. It is granted on the oath of the party injured, in all cases where he has a right to have anything done, and has no other

* The issue of this writ as well as those of *certiorari*, *prohibition*, &c., is now one of the "special matters" comprised in the business of the Queen's Bench Division of the High Court of Justice. The writ now issues from the Crown side of the Queen's Bench Division of the High Court, com-

manding the person to whom it is addressed to perform some public or quasi public legal duty which he has refused to perform, and the performance of which cannot be enforced by any other adequate legal remedy [see *Glossop v. Hoston & Isleworth Local Board*, 12 Ch. D. 122].

specific means of compelling its performance ; and also in *some* cases where the method of redress provided by the law is tedious or incomplete. The court, however, will refuse to exert its extraordinary powers of redress by *mandamus*, where the ordinary remedy by action at law is adequate to enforce the legal right in question. And although a *mandamus* will be granted "when that has not been done which a statute orders to be done," it will not be allowed to go "for the purpose of undoing what has been done" [*Broom Com.** 227].

The proceeding by *mandamus* appears indeed to have been "originally confined in its operation to a very limited class of cases affecting the administration of public affairs ; such as the election of corporate officers, the restoration of officers improperly removed, the compelling inferior courts to proceed in matters within their jurisdiction, or public officers to perform duties imposed upon them by Common Law or by statute, as to make a rate and the like." In more recent times, however, the applicability of the remedy in question has been extended, not merely to the cases first above-mentioned, but to some others. In the course of modern legislation no session of Parliament occurs in which Acts of Parliament do not pass for making railways, forming docks, building bridges, improving towns, and for carrying out an infinite variety of public works, for the most part to be done by joint-stock corporations or companies for the benefit of shareholders. Now, in almost every Act of this kind, provisions are to be found which direct that the company shall do certain works for the benefit of individuals, *ex. gr.*, "making communications between lands intersected by works authorised by the Acts, substituting new buildings for others which have been necessarily removed, making roads and communications

* 3rd edition.

in lieu of old ones blocked up or injured," and various other works of a similar character. In the event of non-compliance with these enactments, the individual who suffers detriment therefrom may resort to the remedy of *mandamus* [Br. Com. 228].

Further, the Court of Queen's Bench will in general exercise control over inferior courts by *mandamus*, when the latter, having jurisdiction, refuse to act; but the writ is never granted on the ground that in any particular case the court below has come to an unjust or improper conclusion. It is also sometimes issued in aid of legal proceedings, as by ordering that a creditor of a company should be at liberty to inspect the register of the shareholders with a view to his issuing execution against them, or by commanding a clerk of a County Court to issue execution after judgment recovered, or it may issue to the Mayor and Assessors of a borough commanding them to revise the burgess list [Br. Com. 229].

It may be observed that the writ, in the first instance, commands the party to whom it is addressed to do the act required, *or* to make a return thereto by showing cause why he does not do it; and unless he does the act or succeeds in quashing the writ as being insufficient on the face of it, he must proceed in answer to the writ either by plea or demurrer; but if judgment is given against him, the court awards a *peremptory mandamus*, and in cases of private injury damages and costs [Br. Com. 230].

When a rule is applied for asking that a writ in the alternative shall thus issue, such a rule may be *nisi* only, or may be absolute in the first instance, and, if the court shall think fit, it may bear *teste* on the day of its issuing, and may be made returnable forthwith [Br. Com. 230].

"A writ of *mandamus*," says Bowen, L. J. [*In re Nathan*, 12 Q. B. D. 461], "is a high prerogative writ,

invented for the purpose of supplying the defects of justice. By Magna Charta the Crown is bound neither to deny justice to anybody nor to delay anybody in obtaining justice. If, therefore, there is no other means of obtaining justice, the writ of *mandamus* is granted to enable justice to be done. The proceeding, however, by *mandamus* is most cumbrous and most expensive; and from time immemorial accordingly the courts have never granted a writ of *mandamus* where there was another more convenient or feasible remedy within the reach of the subject."

The principal general rules as to granting the high prerogative writ of *mandamus* may be summed up thus:—

- (1) The applicant must have a legal right to the performance of some duty of a public and not merely private character.
- (2) There must be no other effective lawful method of enforcing the right.
- (3) The court must be convinced that the remedy by *mandamus* will be practically effective to secure the object aimed at.
- (4) There must have been a demand made upon the person or body on whom the performance of the duty sought to be enforced is incumbent, and a neglect and refusal by such person or body to perform it.
- (5) The application must be to compel the performance of some duty which has not been done. It must not be to order the undoing of an act which has been done.
- (6) The application must be made in proper time: *i.e.*, it must not have been delayed too long, nor, on the other hand, must it be made prematurely; and
- (7) The court must be satisfied as to the propriety of the motives of the applicant [Shortt on

Informations, Mandamus, and Prohibition, p. 223. See further *The Queen v. Lam-bourn Valley Railway Co.*, 22 Q. B. D. 463].

Certiorari. The writ of *certiorari* used to be issued for the purpose of removing a suit from an inferior into one of the Superior Courts of Common Law. It was directed to the Judge or officers of an inferior court, commanding him or them to return the record of a cause there depending, to the end that more sure and speedy justice might be done between the parties. The right of thus removing a cause existed at Common Law, but had been limited to some extent in its applicability by statute [Br. Com. 237].

The writ of *certiorari* may now be said to be the process by which the Queen's Bench Division directs the Judges or officers of any inferior court to certify or send proceedings before them, whether for the purpose of examining into the legality of such proceedings or for giving fuller or more satisfactory effect to them than could be done by the court below [Short and Mellor's Practice of the Crown Office, p. 219].

Procedendo. *Procedendo* is a prerogative writ addressed by a Superior to an Inferior Court directing the latter to proceed forthwith to deliver judgment, or remitting to an inferior court an action which has been removed on insufficient grounds to the Superior Court by *habeas corpus*, *certiorari*, or any like writ [see Br. Com. 237].

Prohibition. The writ of *prohibition* issues out of a Superior Court at Westminster, and is directed to the Judge of an Inferior Court, or the parties to a suit therein, or both conjointly, requiring that the proceedings which have been commenced there be either conditionally stayed or peremptorily stopped. The object of the writ is the keeping of the court to which it is directed within its proper jurisdiction, or to repress the assumption of authority by any pretended court [Br. Com. 231].

Writs of *prohibition* used commonly to issue to Courts Ecclesiastical, where something was being done by them contrary to the general law of the land or manifestly out of the jurisdiction of the court.

Prohibition to the temporal courts is limited to those cases where they act either without or in excess of jurisdiction. Thus, the writ will not lie in respect of mere irregularities which may have occurred in the proceedings of the Inferior Court, nor because the Judge, in deciding any particular question properly before him, has erred in his judgment upon the law; but the applicant may be put to declare in prohibition if the question raised on argument appear doubtful, or, perhaps, if it is required by the party against whom the application is made. In the declaration must be set forth the grounds on which the prohibition is demanded; to this declaration the party defendant may demur or plead such matters, by way of traverse or otherwise, as may be proper to show that the writ ought not to issue, and the proceedings are then continued as in an ordinary action to judgment. If the verdict and judgment be for the plaintiff, the writ of *prohibition* issues, and all proceedings must be suspended, by those to whom it is directed, upon pain of attachment [Br. Com. 233].

A prohibition may issue in some instances after judgment has been given below; and though it cannot go after execution has been completed, yet when goods seized in execution remain unsold the writ may go to stay further proceedings [Br. Com. 234].

The origin of the writ of *prohibition* has been stated as follows:—

“As all external jurisdiction, whether ecclesiastical or civil, is derived from the Crown, and the administration of justice is committed to a great variety of courts, hence it hath been the care of the Crown that

these courts keep within the limits and bounds of their several jurisdictions prescribed them by the laws and statutes of the realm. And for this purpose the writ of *prohibition* was framed" [Bacon's Abridgement—Prohibition].

The broad governing principle is that a prohibition lies where a subordinate tribunal has no jurisdiction at all to deal with the cause or matter before it, or where in the progress of a cause within its jurisdiction some point arises for decision which the Inferior Court is incompetent to determine. But a prohibition will not lie where the Inferior Court has jurisdiction to deal with the cause and with all matters necessarily arising therein, however erroneous its decision may be upon any point [Shortt on Informations, &c.]. The granting of a writ of *prohibition* to an Inferior Court is discretionary [*Broad v. Perkins* 21 Q. B. D. 533].

A writ of *prohibition* is a remedy *ex debito justitiæ*, and lies before or after sentence, and it is not necessary that a party applying for it should, as in applications for injunctions, show that he would be otherwise without remedy. If a party have two remedies given him by law, the existence of one will not prevent his taking advantage of the other, particularly if the latter remedy is likely to be more prompt and certain than the former. And so, a writ of *prohibition* on a District Judge may issue in cases in which an appeal lies upon his orders [*In the Matter of the Application of John Ferguson for a Writ of Prohibition against the D. J. of Colombo*, 1 N. L. R. 181].

Whenever it appears to the Supreme Court or to any Judge thereof—

- (a) That a fair and impartial trial cannot be had in any particular court or place ; or
- (b) That some question of law of unusual difficulty is likely to arise ; or

Power of
Supreme
Court to
transfer
cases.

(c) That a view of the place in or near which any offence is alleged to have been committed may be required for the satisfactory inquiry into or trial of the same ; or

(d) That it is expedient on any other ground ;—
the court or Judge may make order, upon terms deemed fit, for the transfer of any prosecution, matter, or thing before the Supreme Court in its original jurisdiction from any circuit to any other circuit, or to any other place in the same circuit or to any other court, or for the transfer of any cause, suit, action, prosecution, matter, or thing in any court other than the Supreme Court to any other such court. Every transfer should be made after application by motion, supported by affidavit setting out the grounds on which it is based.

The Supreme Court, in making an order for transfer, may direct the court to which the transfer is made to re-call witnesses already called by the court from which the transfer is made, and take their evidence afresh [sect. 46].

When it appears to the Attorney-General that it is expedient that any inquiry into or trial of any criminal offence should be transferred from any court or place to any other court or place, he may by his *fiat* in writing designate such last mentioned court or place, and the inquiry or trial must then be held on the authority of such *fiat*, which must be filed of record with the proceedings of the case transferred. In every case of such transfer the provisions of sections 248 and 249 of the Criminal Procedure Code must be taken to apply.

Transfer of
criminal case
by Attorney-
General.

Any party considering himself aggrieved by a transfer on a *fiat* of the Attorney-General may apply to the Supreme Court or any Judge thereof, by motion supported by affidavit, for a re-transfer or for a transfer, to any other court or place, of such inquiry or trial. The

Supreme Court may, after notice to the Attorney-General, grant such application [sect. 47].

Notice to
Attorney-
General on
application
for a transfer.

Every accused person making an application for a transfer under section 46, or for a transfer or re-transfer under section 47, must give to the Attorney-General and also to the complainant notice in writing of such application, together with a copy of the grounds on which it is made. No order should be made on the merits of the application for at least forty-eight hours after the receipt of such notice. The applicant may be required by the Supreme Court to execute a bond, with or without sureties, to pay, if convicted, the costs of the prosecution [sect. 48].

Supreme
Court may
issue writs of
habeas
corpus.

The Supreme Court or any Judge thereof may issue mandates in the nature of writs of *habeas corpus* to bring up before such court or Judge—

- (a) The body of any person to be dealt with according to law ;
- (b) The body of any person illegally or improperly detained in public or private custody ;

and to discharge or remand any person so brought up, or otherwise deal with him according to law.

In cases of imprisonment or detention in places beyond the jurisdiction of the District Court of Colombo, the Supreme Court or Judge may require the body of the person imprisoned or detained to be brought up into the nearest District Court, Court of Requests, or Police Court ; and direct the District Judge, Commissioner, or Magistrate to inquire into and report upon the case to such court or Judge, and make such provision for the interim custody of the body produced as to such court or Judge may seem right. Upon the receipt of such report the Supreme Court or Judge may make order with reference to the person imprisoned or detained according to law, and the District Court, Court of Requests, or Police Court

aforesaid must carry into immediate effect such order [sect. 49].

The following are the chief among the various forms of the writ of *habeas corpus* :—

Different forms of the writ of *habeas corpus*.

- (1) *Habeas corpus ad subjiciendum*, used for protecting the liberty of the subject by examining into the legality of commitments for criminal or supposed criminal matters, or of any other forcible detention, including imprisonments, and also for admitting to bail prisoners legally committed.
- (2) *Habeas corpus ad testificandum*, for bringing up prisoners to give evidence.
- (3) *Habeas corpus ad respondendum*, for bringing up prisoners to be examined or tried on criminal charges.
- (4) *Habeas corpus ad deliberandum* and *recipias*, for removing prisoners from one custody to another for the purpose of trial ; and
- (5) *Habeas corpus ad faciendum et recipiendum*, or, as it is sometimes called, *habeas corpus cum causâ*, to bring up the person of a defendant who is in custody under civil process of an inferior court, and likewise to remove the suit in connection with which he has been taken in execution into the Superior Court whence the writ issued [*Mitchell v. Micheson*, 1 B. & C. 513]. As to the difference between this proceeding and that of *certiorari*, see *Clark v. Mayor, &c., of Berwick*, 4 B. & C. 649]. See further as to the writ of *habeas corpus*, *Cox v. Hakes* [15 App. Cas. 506], considered and explained in *The Queen v. Barnardo* [1891, 1 Q. B. 194], and see, as to practice, Short and Mellor's Practice of the Crown Office, p. 350.

The following is the ordinary form of the writ of *habeas corpus ad subjiciendum* as issued from the Queen's Bench :—

“Victoria, by the Grace of God, &c., to.....Greeting:

“We command you that you have in the Queen's Bench Division of Our High Court of Justice [or before a Judge in Chambers], at the Royal Court of Justice, London, immediately after the receipt of this Our writ, the body of A. B., being taken and detained under your custody as is said, together with the day and cause of his being taken and detained, by whatsoever name he may be called therein, to undergo and receive all and singular such matters and things as Our said Court [or Judge] shall then and there consider of concerning him in this behalf; and have you there then this Our writ.

“Witness, &c.”

Of the several kinds of writs of *habeas corpus* the only one, according to Thompson [vol. I., p. 212], that can be regarded as attaching to the civil jurisdiction of the Supreme Court is the writ of *habeas corpus ad subjiciendum*, which is the remedy used for deliverance from illegal confinement. The writ is granted upon motion, yet not as of course, but on showing probable cause, inasmuch as when once granted the person to whom it is directed can return no satisfactory excuse for not bringing up the body of the prisoner except that the prisoner is not in his power and custody. With that exception, the return that is made to it is made by producing and setting forth the grounds and proceedings upon which he is in custody. If the return presents sufficient matter to justify the detention, the prisoner is remanded to his former custody; if insufficient, he is discharged [1 Th. 213].

If the return is made by producing the prisoner and proceedings, it cannot be traversed and need not be verified by affidavit; but its validity is determined

upon argument on the day of the return, though sometimes new matter is allowed to be introduced to guide the discretion of the court. A writ of *habeas corpus* may be quashed for irregularity or fraud, but not for matter properly returned to it [1 Th. 213].

Wilful disobedience of the writ is deemed a contempt of court; and re-imprisoning, on the same excuse, a person delivered by *habeas corpus* would call down on the person so doing the highest penalties. Also, if the respondent should deny, on affidavit or otherwise, that the prisoner is in his possession, custody, or power, the Court will severely punish him, should the assertion prove to be untrue [*Re Seevery Amma*, Civ. Min. 18th and 22nd Dec., 1862; 1 Th. 214].

In the case of children, the court generally makes no order until the child is produced in court, especially where the parties agree that the child cannot be found [*Re Catchy Hami*, Civ. Min. 28th Oct., 1862; 1 Th. 214]. If the court is convinced that the child is of an age and intelligence to choose for itself with whom it will live, and if that person is respectable and able to maintain the child, it will leave the choice to the child [*Re Mastan*, Civ. Min. 16th Nov., 1854; 1 Th. 214]. And even if the child is not of such an age, if the applicant for the writ cannot maintain the child, and the child is unwilling to go with the applicant, the court will make no order [*Re Justina*, Civ. Min. 28th Oct., 1862; 1 Th. 214]. Even if the applicant is the mother, and the child is in good hands, the court will only order that the mother may have access to the child [*Re Manhamy*, Civ. Min. 7th Nov., 1862; 1 Th. 214]. In any case, whatever the religion of the relatives, where the child's relation has consented to the child being taken, at the time of its extreme need, by a person who has maintained it, and is willing to continue to maintain it with all proper kindness, and in comfort and respectability; and where that relation, after a long time, comes

forward at a very suspicious period of a female child's life to claim possession of it, though utterly unable to maintain it, the court will not misuse the writ to take the child from a good and virtuous home and deliver it over to misery and want, probably to vice, and certainly to grievous temptations [*Re Ceysa Malitia*, Civ. Min. 17th June, 1862 ; 1 Th. 215].

In cases where the writ of *habeas* is used to settle the custody of children where the father and mother are living apart, the Supreme Court is guided by the Charter and the Roman-Dutch Law, and not by the English Law of parental authority. The Ceylon Judges exercise, of course, a much larger discretion in this matter than the Judges allow themselves in England. By English Law the wife has no power over the child during the father's lifetime, and, until lately, could be denied access to it ; but under the Roman-Dutch Law the mother has an authority equal with the father. In such cases the Supreme Court, for the above reasons, and because it is a Court of Equity, has exercised a discretion much resembling that exercised by the Lord Chancellor, who, as *parens patriae*, looks to the interests of the children as well as to the circumstances and wishes of the parents. Therefore, if the court sees reasons for such a course, it will decide that the mother shall have the custody instead of the father [*Re Greig*, 13th Jan., 1859, J. & B. Rep. 4 ; *Farmer v. Farmer*, Menzies R. 251 ; 1 Th. 215].

Of course, in the case of Kandians, Mohammedans, and persons under the Thesawalame, the court will have regard to their laws ; but though, by such laws, one relative may have preference over another, the Supreme Court does not necessarily follow that preference. [*In re Aysa Natchia*, Civ. Min. 6th Aug., 1861 ; 1 Th. 216].

Where, upon the return to a writ of *habeas corpus*, issued at the instance of a father for the purpose of obtaining the restoration of his daughter who was in

the custody of the respondent, it appeared that the girl was over fifteen and under sixteen years of age, and desired to remain in the custody of the respondent. *held*, that the girl was not of an age to exercise a discretion, and must be restored to her father [*The Queen v. Jayakodi*, 9 S. C. C. 148].

With regard to writ of *habeas corpus* relating to illegal confinement for criminal or supposed criminal matters, or to bring up a criminal to receive sentence, there can be no doubt that the Supreme Court has power to issue such a writ, and to punish for contempt of it; but whether it has the power to inflict the penalties contained in the *Habeas Corpus* Act for disobedience to the writ, or violation of liberty obtained under it, is extremely doubtful. That Act is not extended to the Plantations, and refers only to writs issued in England, and not from a court in a Colony having the right to issue writs of *habeas corpus* [1 Th. 216].

The Supreme Court or any Judge thereof may direct—

The Supreme Court may have prisoners brought up and removed.

(a) That a prisoner detained in any prison be brought before a Court-martial or any Commissioners acting under the authority of any Commission from the Governor for trial to be examined touching any matter pending before such Court-martial or Commissioners respectively;

(b) That a prisoner be removed from one custody to another for the purposes of trial; or

(c) That the body of a defendant be brought in on the Fiscal's return of *cepi corpus* to a writ of attachment.

Until rules are framed under the provisions of section 53, the practice of the Court as to obtaining and issuing writs of *habeas corpus* and as to the return thereto apply to this section and section 49 [sect. 50].

Supreme Court may punish in a summary manner for contempt.

The Supreme Court or any Judge thereof has full power to take cognizance of, and to try in a summary manner, any offence of contempt committed against or in disrespect of the authority of itself or of any other court which such court has not jurisdiction under section 59 of the Courts Ordinance to take cognizance of and punish. On conviction the offender may be committed to jail until he purges his contempt, or for such period as to the court or Judge may seem meet. The imprisonment for contempt may be simple or rigorous, and the offender may, in addition thereto or in lieu thereof, be sentenced to pay a fine not exceeding five thousand rupees [sect. 51].

The Supreme Court has all the powers for punishing for contempt, wherever committed in this Island, possessed by the Superior Courts of Westminster [*In the Matter of the Application of John Ferguson for a Writ of Prohibition against the D. J. of Colombo*, 1 N. L. R. 181].

Judge may reserve any question for decision of two or more Judges.

When a question of doubt or difficulty arises for adjudication in any case before a single Judge of the Supreme Court, he may reserve it for the decision of two or more Judges. This provision does not affect the provisions of chapter 32 of the Criminal Procedure Code [sect. 52].

Judges may frame rules.

The Judges of the Supreme Court or any two of them, of whom the Chief Justice must be one, may frame rules and orders for regulating all or any of the following matters:—

- (1) The form and manner of proceeding to be observed in bringing before the Judges by way of review any judgment, &c., against which an appeal may, under the Charter of 1833 or section 42 of the Courts Ordinance, be preferred to Her Majesty in her Privy Council.
- (2) The form and manner of proceeding to be observed by the Supreme Court at general

sessions and at civil and criminal sessions, and in all courts subordinate to it, and the keeping of all books, entries, and accounts to be kept in all such subordinate courts, and for the preparation and transmission of any returns or statements to be prepared and submitted by such courts ;

- (3) The pleading, practice, and procedure where not specially provided for by the Civil Procedure Code or the Criminal Procedure Code, upon all actions, suits, prosecutions, and other matters, civil and criminal, to be brought in the Supreme Court and in all courts subordinate to it ;
- (4) The proceedings of Fiscals and other ministerial officers of the said courts, and the process of the said courts and the mode of executing the same ;
- (5) The mode of summoning, empanelling, and challenging of assessors and jurors ;
- (6) Proceedings on arrest in *mesne* process or in execution ;
- (7) The taking of bail ;
- (8) The duties of jailers and others charged with the custody of prisoners in so far as respect the making due returns to the respective Judges of the Supreme Court of all prisoners in their custody ;
- (9) The mode of prosecuting appeals ;

and may generally frame and establish all such general rules and orders as may be necessary for giving full and complete effect to the provisions of the Courts Ordinance, and for regulating matters relating to the practice of the said courts not specially provided for by the Civil or the Criminal Procedure Code, and to the duties of the officers thereof, and to the costs of

proceedings therein ; and may also frame forms for any proceeding in the said courts for which they think a form should be provided ; and may, as occasion may require, alter, amend, or renew all such rules, orders, forms, &c. Such rules, &c., should not be inconsistent with the provisions of any Ordinance.

All such rules, &c., as aforesaid, and those that may be framed by the Supreme Court under the provisions of any other Ordinance, must be laid before the Legislative Council, and if within forty days of their being so laid the said Council object to any of the rules, &c., it may, by resolution, annul the rules objected to.

The rules, &c., not annulled by the Council within the forty days should be proclaimed in the *Government Gazette*, and they come into operation upon such publication or on such other day as is specified in the Proclamation.

Rules, &c., made by the Supreme Court under any authority in that behalf, and existing at the commencement of the operation of the Courts Ordinance and not expressly repealed or modified by it, continue to be in force [sect. 53].

Judges may
amend or
revoke rules.

The Judges of the Supreme Court collectively may, as provided for in section 53 with reference to rules, &c., to be made under it, revoke or amend any rules, &c., made under the provisions of any Ordinance prior to the Courts Ordinance and for the time being in force [sect. 54].

Commis-
sions for
examination
of witnesses.

Commissions for the examination of witnesses may be issued to the Supreme Court by any competent tribunal in Her Majesty's dominions [see 22 Vict. c. 20, sects. 1, 5]. The Supreme Court may nominate a fit person to take the evidence of the witnesses [48 & 49 Vict. c. 74, sect. 2]. In the same way the Supreme Court may order the examination of any witness whose testimony is required by a foreign tribunal in any civil or commercial [19 & 20 Vict. c. 113, sects. 1, 6] or

criminal [33 & 34 Vict. c. 52, sect. 24] matter pending before it.

DISTRICT COURTS, COURTS OF REQUESTS,
AND POLICE COURTS GENERALLY.

District Courts within the several districts, and Courts of Requests and Police Courts within the several divisions of the Island are established by the Governor by Proclamation. Each District Court, Court of Requests, and Police Court is held by and before one person called the District Judge, Commissioner of Requests, and Police Magistrate, respectively, and at such convenient place or places within each district and division as is by the Governor from time to time appointed. Until the publication of a Proclamation under the Courts Ordinance, the District Courts, Courts of Requests, and Police Courts existing at the commencement of the operation of the Ordinance were to continue to be held as before. The Courts Ordinance did not affect the power of a Police Magistrate under the provisions of any law for the time being in force to hold court at any convenient spot within the limits of the division for which he is appointed [sect. 55].

Establish-
ment.

The Governor may appoint more than one District Judge, Commissioner of Requests, or Police Magistrate to the same District Court, Court of Requests, or Police Court, respectively; or appoint any District Judge, Commissioner of Requests, or Police Magistrate to have concurrent jurisdiction with any other such Judge, Commissioner, or Magistrate over any district or districts, division or divisions, or any part thereof respectively. The District Courts, Courts of Requests, and Police Courts already established at the commencement of the operation of the Courts Ordinance were to exercise the jurisdiction and powers vested in such courts by that Ordinance and by the Criminal Procedure Code and any other Ordinance for the time being in force [sect. 56].

More than
one Judge
may be
appointed for
any court.

Provision for
Additional
Judges.

An Additional Judge, Commissioner, or Magistrate appointed as aforesaid may sit apart, and exercise, respectively, all powers and jurisdictions vested in the single Judge, Commissioner, or Magistrate [sect. 57].

The provisions of this section and the two preceding ones do not admit of any such court as "the Additional Police Court of ———," as if each of the several Magistrates whom the Governor may appoint to a court constituted a distinct and independent court. The proceedings before each such Magistrate should be intituled "In the Police Court of ——— (naming the division), holden at ———, before ———, one of the Magistrates of the said court" [*Jansen v. Arnolis*, 1 N. L. R. 274].

There is no objection to one Magistrate of a Police Court entertaining a complaint and issuing process to compel the attendance of an accused person before the court, and the inquiry or trial being undertaken by another Magistrate of the same court, nor is it objectionable for one Magistrate to admit to bail a person who has been dealt with by another Magistrate of the same court, or to perform a purely ministerial act like communicating to an accused the order of the Supreme Court in appeal, and to give effect to such order. But where one Magistrate has commenced to hear a case, he must continue it to the end, unless it falls within section 89 of the Ordinance [*ibid.*].

Appointment
of Judges.

District Judges, Commissioners of Requests, and Police Magistrates are appointed by the Governor subject to the pleasure of Her Majesty, and hold office during pleasure [sect. 58].

Special
criminal
jurisdiction as
to contempt.

Every District Court, Court of Requests, and Police Court has a special jurisdiction to take cognizance of, and to punish by, the procedure and with the penalties provided by law, every offence of contempt of court committed in the presence of the court itself, and all offences committed in the course of any act or

proceeding in the said courts respectively, and which are declared by any law to be punishable as contempts of court [sect. 59].

Before the enactment of the Courts Ordinance it was held *In the Matter of the Application of John Ferguson for a Writ of Prohibition against the District Judge of Colombo* [1 N. L. R. 181] that a District Court was a court of record, and had power to punish summarily contempts committed in the face of the court, such as insult to the Judge, interruption of the proceedings of the court, disobedience to its lawful orders or process, obstruction to its officers in the execution of its processes or orders, &c., and that District Courts could not be viewed as representing in this Colony the Superior Courts of Law and Equity in England, and they had not the powers vested in the latter as to summary attachment for contempts in respect of acts done out of court.

Semble, there is no distinct recognition in Roman-Dutch Law authorities of the right of a Judge to deal summarily with contempts not committed in the face of the court, nor committed by way of obstruction to its orders, or with reference to any suit or proceeding pending in the court [*ibid.*].

In an action for the recovery of certain jewellery, it being found, after evidence of both parties had been heard, that the plaintiff owed a certain sum of money to the defendant, who was in possession of the jewellery, the District Judge, without entering a decree in favour of either party, recorded his opinion as follows:—"The most equitable course is to order the plaintiff to bring into court the sum of Rs. 91 within fourteen days, and the defendant to bring into court jewellery also within fourteen days, to abide the further order and decree of this court." No formal order was drawn up—*held*, that this order was irregular and *ultra vires*, and that a disobedience of it by the defendant did not justify

his conviction as for a contempt of court [*Pieris v. Fernando*, 1 N. L. R. 306].

Appointment
of subordi-
nate officers.
and their
suspension.

The ministerial and other subordinate officers of District Courts, Courts of Requests, and Police Courts are appointed by the Governor, and hold their offices during pleasure. But any District Judge, Commissioner, or Magistrate may suspend any subordinate officer of his court from office for misconduct or other sufficient cause, and appoint some other person to act in his stead until the Governor's pleasure is made known [sect. 60].

Advocates
and proctors.

Advocates and proctors entitled to practise in the Supreme Court are entitled to practise in any District Court, Court of Requests, or Police Court. All persons admitted to practise as proctors in any District Court are admitted to practise in such court and in any Court of Requests or Police Court held within the district over which such court has jurisdiction [sect. 61].

Abolition of
District
Courts and
creation of
new districts.

When a District Court is abolished, the proctors of such court are entitled to be enrolled in the District Court, which they elect, of any one of the districts to which the jurisdiction of the abolished court may be allotted. When a new district is created, a proctor of any District Court from which any part of such new district is taken may take his name from the roll on which it stands, and have it enrolled in the District Court of such new district [sect. 62].

Abolition or
alteration of
jurisdiction
of court.
Provision for
continuance
of cases.

When a District Court, Court of Requests, or Police Court is abolished, or its jurisdiction altered by Proclamation, every suit, &c., then depending before it should be proceeded upon in the court having jurisdiction after such Proclamation; and all the records, &c., belonging to such suit, &c., must be delivered by the court in which the same is then pending to the court having jurisdiction, after the Proclamation aforesaid [sect. 63].

DISTRICT COURTS.

A District Court is a Court of Record, and has original jurisdiction in all civil, criminal, revenue, matrimonial, insolvency, and testamentary matters, save and except such of the aforesaid matters as are by any enactment for the time being in force exclusively assigned by way of original jurisdiction to the Supreme Court. It has also jurisdiction over the persons and estates of lunatics, minors, and wards, over the estates of cestuique trusts, and over guardians and trustees, and in any other matter in which jurisdiction is given to District Courts by law [sect. 64].

Jurisdiction
of District
Courts.

A District Court has no power to enforce a decree against another court, although of inferior jurisdiction. So, where an action was brought in a District Court to set aside a judgment fraudulently obtained in a Court of Requests, it was held that the court itself in which the fraud had been committed should be called on to deal with it [*Kurukal v. Murugan*, 1 S. C. R. 259].

Every District Court has cognizance of and full power to hear and determine all pleas, suits, and actions in which a party defendant is resident within the district in which such suit or action is brought, or in which the cause of action has arisen within such district, or where the land in respect of which the action is brought lies or is situate wholly or partly within such district [sect. 65].

Civil
jurisdiction.

A District Court has no jurisdiction to interfere in the concerns of religious communities, unless a civil element enters the rules which any such community has made for its members in relation to the religious object which it has combined to maintain, bringing the matter within the sphere of the civil jurisdiction of the court [*Mohamadu v. Koreen*, 1 N. L. R. 351].

Every District Court has full power and authority, and is by the Courts Ordinance required to hear, try,

Criminal
jurisdiction.

and determine in manner in the Criminal Procedure Code provided, all prosecutions and charges instituted and preferred before it against any person for or in respect of any crime or offence committed wholly or in part within the district in and for which it is held, and which is by any law in force in the Colony made cognizable by District Courts. On conviction the court has power to award such punishment as by any law for the time being in force the crime or offence is made punishable with, and as by the Criminal Procedure Code such court is made competent to impose [sect. 66].

Power to
remove or
abate matter
of complaint.

In the case of a continuing offence in which a District Court may legally exercise jurisdiction in respect of the punishment, such court may also remove or abate the act, matter, or thing complained of [sect. 67].

Revenue
jurisdiction.

Every District Court has power to entertain causes affecting the revenue, and to inquire of offences against the revenue laws of the Island committed wholly or in part within the district over which such court has jurisdiction; and to hear, try, and determine all suits and prosecutions commenced by the Attorney-General against any person for any such offences, and to impose the fines, &c., appertaining to such offences, although the same may exceed the sum which such court is authorised to impose in the exercise of its ordinary criminal jurisdiction [sect. 68].

Testamentary
jurisdiction.

Every District Court has full power and authority—

- (1) To appoint administrators of the estates of any persons dying within its district, whether such estates are within such district or any other district or districts within the Island.
- (2) To inquire into and determine upon the validity of any document adduced before it as the last will of a person who has died within its district, and to grant probate thereof.

- (3) To appoint administrators for the administration or execution of the trusts of any such will in cases in which the executors or trustees thereunder do not take out probate, or resign or become incapable to carry such trusts into execution ;
- (4) To take securities from executors or their attorneys and from administrators for the faithful performance of their trusts and for the filing of proper accounts, and to call them to account ; to cause accounts rendered by them to be audited, to enforce payment of any balance in their hands, to take order for the secure investment of such balances, and the apportionment thereof among those entitled, and from time to time to remove and replace such administrators [sect. 69].

When any person dies anywhere out of the Colony leaving property within the Colony, the Supreme Court or any Judge thereof may appoint a District Court to exercise sole testamentary jurisdiction in respect of his property.

Supreme Court may appoint court to exercise sole testamentary jurisdiction in certain cases. Power of transfer.

When a court has issued probate or letters of administration under section 69 in respect of the will or estate of a person who has left property within the jurisdiction of any other court, or where application for probate or letters has been made to any court, the Supreme Court or any Judge thereof may make order for the transfer of the cause, &c., in regard to any such probate or administration pending in any such court to such other court [sect. 70].

Every District Court has the care and custody of the persons and estates of all idiots and lunatics and of others of insane and non-sane mind resident within its district, and may appoint guardians and curators to such persons and their estates, and take securities from such guardians and curators, call them to account.

Custody of persons and estates of idiots, lunatics, &c., and of minors and wards.

charge them with any balance in their hands, enforce payment thereof, take order to secure investment of such balance, and remove and replace them as occasion may require.

Such court has also, in like manner and with the same powers, the care of the persons of minors and wards and the charge of their property within its district [sect. 71].

Assessors.

The District Judge may, at his own instance or upon the application of any party, have three assessors associated with him at the hearing and decision of a cause or other proceeding. Such assessors are to be selected and summoned in terms of rules to be made by the Judges of the Supreme Court as stated above (see page 176), and are to be otherwise subject to such rules. In case of difference of opinion between the Judge and Assessors, the judgment of the Judge prevails [sect. 72].

In the appointment of assessors the parties to the case should not be asked to nominate any, but they should be selected by the Judge on his own responsibility, due weight being given to any objections that may be made by either party to any assessor on the ground of interest or bias or on any other ground [*Supramani v. Changarapillai*, 2 N. L. R. 17].

Objection to jurisdiction.

When a defendant or accused party has pleaded in any suit or prosecution in the District Court, without pleading to its jurisdiction, neither party is afterwards entitled to object to the jurisdiction of such court, but such court is to be held to have jurisdiction in the matter. If, however, it appears in the course of the proceedings that the suit or prosecution was brought intentionally and with previous knowledge of the want of jurisdiction, the Judge may refuse to proceed further and declare the proceedings null and void [sect. 73].

If a suit is commenced in a District Court for a debt or demand recoverable in a Court of Requests, the plaintiff will not, by reason of judgment in his favour, be entitled to costs, but the Judge may make order as to costs as justice may require [sect. 74].

Penalty for proceeding in a District Court where case is cognizable by a Court of Requests. Appeal.

Any party dissatisfied with any judgment, decree, or order pronounced by a District Court may, subject to the provisions of the Criminal Procedure Code, and except where the right is expressly disallowed, appeal to the Supreme Court from any error in law or in fact committed by such court. No appeal is to have the effect of staying execution unless the District Judge make order to that effect. In that case the appellant must enter into a bond with or without sureties to appear when required, and abide the judgment of the Supreme Court in appeal [sect. 75].

It was held under this section that where a District Judge dismissed a petition of intervention with costs, reserving his final decision on the question at issue between the plaintiffs and the defendants, the intervenients had no right of appeal until such final decision [*Dissanaike v. Ekenaike*, 1 S. C. R. 39].

Where a judgment, decree, or order is entered or made *ex parte*, the proper course of the party against whom such judgment, decree, or order is entered or made is not to appeal therefrom, but to apply to the District Court, in the first instance, to open it up [see *Gunewardene v. Perera*, 1 S. C. R. 85]. Where, however, an order is made by a Judge of first instance after hearing parties, the remedy of the party considering himself aggrieved is to appeal. The Judge himself cannot re-hear the matter [*Samaranaike v. Silva*, 3 S. C. R. 94].

An order, on the application of a Joint Stock Company through a proctor appointed by a person professing to be the recognised agent and manager of the Company, to the effect that the recognised agent could

not appoint a proctor, and the appointment is therefore bad, is an appealable order, although the application itself was not finally disposed of [*The Singer Manufacturing Co. v. The Sewing Machine Co.*, 2 C. L. R. 200 ; 2 S. C. R. 27].

An order decreeing a certain sum to a plaintiff in an action reserving the question as to the proportion of each defendant's liability is an appealable order [*Siatu v. Saduwa*, 2 S. C. R. 123 ; 3 C. L. R. 17].

An order fixing a case for trial is not an appealable order under this section [*Le Mesurier v. Le Mesurier*, 2 C. L. R. 21].

An order disallowing a motion with liberty to renew it at a future time is not an appealable order [*Muttiah v. Perumal*, 2 C. L. R. 180].

District Court
to execute
judgments,
&c., in appeal.

District Courts must, in all cases of appeal, conform to and execute all such judgments, orders, and decrees of the Supreme Court as are pronounced in appeal in like manner as original judgments of such courts can or may be executed [sect. 76].

COURTS OF REQUESTS.

Jurisdiction.

Every Court of Requests is a Court of Record, and has original jurisdiction to hear and determine all actions in which the debt, damage, or demand does not exceed three hundred rupees, and in which the party defendant is resident, or the cause of action has arisen, within its jurisdiction ; and all hypothecary actions in which the amount claimed does not exceed three hundred rupees, and the land hypothecated or any part thereof is situated within the jurisdiction of the court ; and also all actions in which the title to, interest in, or right to the possession of any land is in dispute, and all actions for the partition or sale of land, provided that the value of the land or of the particular share, right, or interest in dispute, or to be partitioned or sold does not exceed three hundred rupees, and the

same or any part thereof is situate within the jurisdiction of such court. Such court cannot, however, take cognizance of any action for criminal conversation, or for seduction, or for breach of promise of marriage, or for separation *a mensâ et thoro*, or for divorce *a vinculo matrimonii*, or for declaration of nullity of marriage [sect. 77 of the Courts Ordinance and section 4 of Ordinance No. 12 of 1895].*

Claims for any sums due to any person for wages, or for piecework, or for work as a servant, artificer, or labourer, whatever may be the amount claimed, may be prosecuted and recovered before a Court of Requests having in other respects jurisdiction in that behalf. Any such claim may be prosecuted and recovered in such court by a person not of full age in the same manner as if he were of full age, or by a married woman as if she were a *feme sole* [sect. 78].

Wages
recoverable
without
limit in Court
of Requests.
Minors may
sue.

The Commissioner of a Court of Requests may, in pronouncing his judgment or order in any case, make such order as to costs and expenses as to him may appear just and reasonable, subject to the rules to be framed by the Judges of the Supreme Court as stated above (see p. 176) [sect. 79].

Costs.

Any party dissatisfied with any final judgment or order having the effect of a final judgment of a Commissioner may, except where such right is expressly disallowed, appeal to the Supreme Court for any error in law or in fact committed by such Commissioner [section 80, but see note to section 831 of the Civil Procedure Code].

Appeal.

Where the judgment or order is entered or made *ex parte*, the proper course of the party affected is not to appeal therefrom, but to apply, in the first instance, to

* In land suits the residence of the party defendant does not now, as under section 77 of the Courts Ordinance, give jurisdiction in the case of Courts of Requests.

the Court of Requests to open it up [see *Gunewardene v. Perera*, 1 S. C. R. 85].

An order setting aside an *ex parte* decree dismissing a plaintiff's action is not an appealable order, inasmuch as it is not a final judgment or order having the effect of a final judgment [*Silva v. Arnolis*, 3 N. L. R. 108].

Transfer where defence or claim in reconvention is beyond jurisdiction of court.

When in any proceeding before a Court of Requests any defence or claim in reconvention involves matter beyond the jurisdiction of the court, such defence or claim in reconvention does not affect the competence or duty of the court to dispose of the matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the court has jurisdiction to administer can be given to the defendant upon his claim in reconvention. The Supreme Court or any Judge thereof may, however, on the application of either party, order the transfer of the whole case to some court having jurisdiction over the whole matter in controversy. In such case the record should be transmitted by the clerk of the court to the court to which the case is transferred [sect. 81].

Commissioner to execute judgments, &c., in appeal.

The Commissioner of every Court of Requests should conform to and execute all judgments, orders, &c., pronounced and made by the Supreme Court in appeal in like manner as any original judgment or order of the Commissioner may be executed [sect. 82].

POLICE COURTS.

Powers and jurisdictions.

Police Courts exercise all powers and perform all duties which they are empowered to exercise and perform by the Penal Code, or the Criminal Procedure Code, or any Ordinance for the time being empowering them in that behalf [sect. 83].

JUSTICES OF THE PEACE.

Justices of the Peace.

The Governor and the officers (whether holding office permanently or temporarily) enumerated in Schedule

IV. of the Courts Ordinance are *ex officio* Justices of the Peace for the Island, or for such portion thereof respectively as is shown by the statements in the said schedule severally set opposite to their respective denominations. The Governor may from time to time, by notice in the *Government Gazette*, appoint such persons as are named in the notice as Justices of the Peace for the Island or for certain districts or portions thereof only. Every Justice of the Peace must take the oaths of allegiance and office in the form prescribed by Ordinance No. 7 of 1869 before some District Judge, Commissioner of Requests, or Police Magistrate. The Judge, Commissioner, or Magistrate before whom such oaths are taken must enter in the records of his court that the oaths were duly administered and taken before him, and forthwith transmit a copy of such entry to the Registrar of the Supreme Court to be entered in the records of that Court. The Governor may at any time remove from office a Justice of the Peace [sect. 84].

Every Justice of the Peace has power and is bound to administer any oath which any person is legally entitled to make before a Justice of the Peace [sect. 85]. Their powers.

Every person exercising the office of a Magistrate in a Colony has the authority of a Justice of the Peace in England for the purpose of the attestation of soldiers [44 & 45 Vict. c. 58, sect. 94, sub-sect. 1].

MISCELLANEOUS.

The sittings of every court are public, and all persons may freely attend the same. In proceedings and trials, however, in cases for divorce on account of adultery, or for seduction, abortion, rape, assault with intent to commit rape, criminal conversation, unnatural offences, and bastardy, the court may exclude all persons not directly interested therein, excepting Sittings to be public.

advocates, proctors, jurors, assessors, witnesses, and officers of the court [sect. 86].

A District Judge cannot ordinarily exercise his judicial functions elsewhere than in open court [*Mohidin v. Nalle Tamby*, 1 N. L. R. 377]. He cannot act judicially except in court, and an order of discharge of a debtor arrested in execution of a decree, made at the Judge's house, is liable to be set aside as invalid [*Suppramanian v. Curera*, 3 N. L. R. 193].

When parties prevented from doing an act by reason of the court being closed may do such act.

Where parties are prevented from doing anything on a particular day not by any act of their own but by the act of the court itself, for instance, by reason of the court being closed, they are entitled to do it on the first opportunity [*Peary Mohun v. Ananda Charan*, I. L. R. 18, Cal. 631].

Powers of court to grant injunctions.

In any action instituted in any District Court or Court of Requests—

- (1) Where it appears from the plaint that the plaintiff demands and is entitled to a judgment against the defendant restraining the commission or continuance of an act or nuisance, the commission or continuance of which would produce injury to the plaintiff; or
- (2) Where it appears that the defendant during the pendency of the action is doing or committing, or procuring or suffering to be done or committed, or threatens or is about to do or procure or suffer to be done or committed, an act or nuisance in violation of the plaintiff's rights respecting the subject-matter of action and tending to render the judgment ineffectual; or
- (3) Where it appears that the defendant during the pendency of the action threatens or is about to remove or dispose of his property with intent to defraud the plaintiff—

the court may, on its appearing by the affidavit of the plaintiff or any other person that sufficient grounds

exist therefor, grant an injunction restraining the defendant from—

- (1) Committing or continuing any such act or nuisance ;
- (2) Doing or committing or procuring or suffering
to be done or committed any such act or nuisance ;
- (3) Removing or disposing of such property.

For the purposes of this section a defendant who has set up a claim in reconvention and demanded an affirmative judgment against the plaintiff is deemed a plaintiff, and is entitled to an injunction as he would be in an action by him against the plaintiff for the cause stated in the claim in reconvention. The plaintiff, in such case, is deemed the defendant, and the claim in reconvention the plaint [sect. 87].

An injunction as aforesaid may be granted to accompany the summons, or at any time after the commencement of the action and before final judgment and with or without notice, unless the defendant has answered, in which case it can be granted only upon notice or an order to show cause. Where an application for an injunction is made upon notice, or an order to show cause, either before or after answer, the court may grant an injunction restraining the defendant until the hearing and decision of the application [sect. 88].

When to be granted.

In the case of the death, sickness, resignation, removal from office, absence from the Island, or other disability of any Judge before whom any suit, prosecution, or matter, whether on an inquiry preliminary to committal for trial or otherwise, has been instituted or is pending, such suit, prosecution, or matter may be continued before his successor, who may act on the evidence already recorded by his predecessor. Either party, however, except on an inquiry preliminary to committal for trial, may demand that the witnesses be re-summoned and re-heard [sect. 89].

Provision for continuing any case begun before a Judge becoming disabled.

A person who has ceased to hold office as District Judge has no power to sign the formal decree consequent on a judgment delivered by him when in office [*Davidson v. Silva*, 2 S. C. R. 10]. But, a decree being merely the formal expression of the results arrived at by the judgment, it is not necessary that it should be drawn up and signed by the Judge who pronounced the judgment. That may be done by any Judge of the court [*Fernando v. The Syndicate Boat Co.*, 2 N. L. R. 206].

Where an Acting District Judge heard the evidence in a case, but before delivering judgment his appointment terminated, and he was subsequently appointed Additional District Judge for one day, and he then delivered his judgment in the case, *held*, that the case was covered by this section, and the proceedings were in order [*Fernando v. The Syndicate Boat Co.*, 2 N. L. R. 206].

Provision for hearing of cases where Judge, &c., is a party.

No Judge can be compelled, nor, except with the consent of both parties to a case, civil or criminal, is a Judge competent to exercise jurisdiction in it, or to hold any inquiry into, or commit for trial upon, any charge, if he is a party to or is personally interested in such suit, prosecution, or charge; and, except as is by the provisions of "The Courts Ordinance" and of the Civil Procedure Code provided, with regard to the hearing of judgments in review preliminary to appeals to Her Majesty in Her Privy Council, no Judge can hear an appeal from, or review, any judgment, sentence, or order passed by himself. When a Judge so a party or personally interested, or from whose judgment an appeal is pending, is a Judge of the Supreme Court, the suit, prosecution, or appeal must be tried or determined by some other Judge or Judges of the said court. In every other case, the District Court, Court of Requests, or Police Court of an adjoining district or division has jurisdiction.

The question whether a Judge is personally interested in a case must be decided by the principles

of the Law of England applicable to the same question in England [sect. 90].

A plaintiff cannot divide any cause of action for the purpose of bringing two or more actions in a Court of Requests, but a plaintiff having cause of action for an amount exceeding the amount in respect of which a Court of Requests has jurisdiction may abandon the excess, and on proving his case in the Court of Requests will be entitled to recover to an amount not exceeding the amount in respect of which such court has jurisdiction; and the judgment of the court will be in full discharge of all demands in respect of the cause of action, and entry must be made in the judgment accordingly [sect. 91].

Demands not to be divided.

Neither the alleged commission of a crime or offence, nor the conviction nor the acquittal of any person of a crime or offence, is a bar to a civil action for damages against such person at the instance of any person who may have suffered any injury, or who may allege that he has suffered any injury from or by reason of the commission of any such crime or offence [sect. 92].

Conviction or acquittal no bar to any civil action.

Where any crime or offence is declared by any Ordinance to be punishable by such punishment or by such fine or imprisonment as the court before which a conviction therefor is obtained may award, such crime or offence may be tried in any court having criminal jurisdiction which the Attorney-General may elect for its prosecution; but the accused person, in case of conviction, should receive no larger amount of fine or longer term of imprisonment than the court by which he is tried is empowered to award in the exercise of its ordinary jurisdiction.

In what court offences declared punishable by fine or imprisonment generally may be tried.

Such right of electing the court may be exercised by the Attorney-General, though the maximum punishment, if the same be prescribed, exceed that which a Police or District Court is empowered to award [sect. 93].

CHAPTER V.

CIVIL PROCEDURE.

BY the Charter of the 10th February, 1833, the Judges of the Supreme Court collectively, at any general sessions to be holden by them in Colombo, were empowered to "frame, constitute, and establish," subject to the approval of the Crown, such general Rules and Orders of Court as to them should seem meet touching and concerning the time and place of holding the several District Courts, the form and manner of proceedings to be observed therein, and the practice and pleadings upon all actions, suits, and other matters, both civil and criminal, in such courts.

By section 23 of Ordinance No. 10 of 1843, and by section 15 of Ordinance No. 11 of 1843, the Judges of the Supreme Court were given similar powers with reference to Courts of Requests and Police Courts respectively.

In exercise of these powers, Rules and Orders regulating the procedure to be observed in our courts were from time to time framed by the Judges and sanctioned by the Crown.

Subsequently, by Ordinance No. 8 of 1846 Rules theretofore framed were confirmed, and the transmission of those to be thereafter framed to Her Majesty for approval was dispensed with, and their operation made contingent on their enactment by the Legislature; and it was thereby provided that Her Majesty's confirmation or otherwise of any Ordinance embodying the said Rules should be taken as a declaration of Her Majesty's approbation or disallowance of the same.

Since then, divers Ordinances have been passed, some embodying Rules framed as aforesaid by the Judges of

the Supreme Court and others containing substantive enactments touching different matters of procedure of our courts, until the Civil Procedure Code, compiled after the model of the Indian Code of Civil Procedure, was brought into operation as Ordinance No. 2 of 1889. Those of the old Ordinances regulating procedure were thereby repealed.

The Civil Procedure Code is divided into sixty-seven chapters, containing altogether eight hundred and thirty-eight sections, and is here given in its entirety with notes, comments, and authoritative decisions of courts, as more fully explained in the preface to this work.

PRELIMINARY.

Chapter 1.

1 This Ordinance may be cited for all purposes as "The Civil Procedure Code, 1889," and shall come into operation at such date as the Governor shall, by Proclamation to be published in the *Government Gazette*, appoint.

Short title.
Date of operation.

The Ordinance was proclaimed on the 1st August, 1890.

2 On and from the date on which this Ordinance comes into operation the Laws, Ordinances, sections of Ordinances, and Rules of Court, respectively mentioned in the first column of the first schedule hereto, shall be severally repealed to the extent mentioned in the third column thereof, but such repeal shall not affect—

Repeal.

- (1) The past operation of any enactment hereby repealed, nor anything duly done or suffered under any enactment hereby repealed; nor
 - (2) Any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment hereby repealed;
- Saving clause.

nor shall such repeal revive any enactment, right, office, privilege, matter, or thing not in force or existing at

the commencement of this Ordinance. Where any unrepealed Ordinance incorporates or refers to any provision of any Ordinance hereby repealed, such unrepealed Ordinance shall be deemed to incorporate or refer to the corresponding provision of this Ordinance.

Actions
already
pending to be
continued
under the
provisions of
this
Ordinance.

3 Every action, suit, or other matter already instituted and pending in any court at the time of the coming into operation of this Ordinance shall, so far as circumstances permit, be continued and proceeded with to final judgment and execution under the provisions of this Ordinance, in the same manner in every respect as if the same had been originally instituted after the commencement of this Ordinance; and such court may make all such special orders in any such action, suit, or matter as may be necessary for that purpose.

Except where
court sees fit
to direct
otherwise.

Provided always that any such court may, on reasonable cause being shown, direct that any such action, suit, or matter commenced before the coming into operation of this Ordinance shall be continued as if this Ordinance had not passed, up to execution, or to final judgment, or to any stage of such action, suit, or matter which the court may direct.

“Direct that any such action, &c., be continued.”—The order contemplated here is with reference to the requirements of the particular case to be affected by it. A general order directing that all pending actions be continued up to judgment under the procedure obtaining before the Civil Procedure Code came into operation is not a proper order [*Pappe v. Von Possner*, 9 S. C. C. 116].

Where no
provision is
made special
directions to
be given by
Supreme
Court.

4 In every case in which no provision is made by this Ordinance, the procedure and practice hitherto in force shall be followed, and if any matter of procedure or practice for which no provision is made by this Ordinance or by any law for the time being in force shall after this Ordinance comes into operation arise before any court, such court shall thereupon make

application to the Supreme Court for, and the Supreme Court shall and is hereby required to give, such special orders and directions thereupon as the justice of the case shall require.

Provided always that nothing in this Ordinance contained shall be held in any way to affect or modify any special rules of procedure which, under or by virtue of the provisions of any Imperial Statute or of any Ordinance now in force, may have from time to time been laid down or prescribed to be followed by any civil court in this colony in the conduct of any action, matter, or thing of which any such court can lawfully take cognizance, except in so far as any such provisions are by this Ordinance expressly repealed or modified. Proviso.

5 The following words and expressions in this Ordinance shall have the meanings hereby assigned to them, unless there is something in the subject or context repugnant thereto : Interpretation clause.

“Her Majesty” or “The Queen” means the Sovereign for the time being of the United Kingdom of Great Britain and Ireland.

In “The Courts Ordinance” the definitions of the expressions “Her Majesty,” “The Queen,” “The island,” “This island,” “The colony,” “The Governor,” “Court,” “Action,” “Cause of action,” and “Attorney-General” are the same as those in the Civil Procedure Code.

“The island,” “This island,” and “This colony” mean respectively the island of Ceylon and its dependencies.

“The Governor” includes the person for the time being administering the Government of Ceylon.

“The Government” means the person or persons authorised by law to administer Executive Government in Ceylon.

“Attorney-General” includes also the Solicitor-General and any Crown Counsel specially authorised by the Attorney-General to represent the Attorney-General.

“Public officer” includes all officers or servants employed in this colony by or under the Imperial Government or the Government of Ceylon.

“Recognised agent” includes the persons designated under that name in section 25 and no others.

“Action” is a proceeding for the prevention or redress of a wrong.

“Cause of action” is the wrong for the prevention or redress of which an action may be brought, and includes the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty, and the infliction of an affirmative injury.

“Court” means a judge empowered by law to act judicially alone, or a body of judges empowered by law to act judicially as a body, when such judge or body of judges is acting judicially.

“Civil court” means a court in which civil actions may be brought.

“Original court” includes district courts and courts of requests.

“Original court,” in “The Courts Ordinance,” includes the Supreme Court sitting in its original jurisdiction, District Courts, Courts of Requests, and Police Courts.

“Judge” means the presiding officer of a court, and includes Judges of the Supreme Court, District Judges, and Commissioners of Requests.

“Judge,” in “The Courts Ordinance,” includes Judges of the Supreme Court, District Judges, Commissioners of Requests, and Police Magistrates.

“Decree” means the formal expression of an adjudication upon any right claimed or defence set up in a civil court, when such adjudication, so far as regards the court expressing it, decides the action or appeal.

[An order rejecting a plaint is a decree within this definition.]

“Order” means the formal expression of any decision of a civil court which is not a decree.

“Judgment” means the statement given by the judge of the grounds of a decree or order.

“Judgment-debtor” means any person against whom a decree or order capable of execution has been made.

“Judgment-creditor” and “decree-holder” mean any person in whose favour a decree or order capable of execution has been made, and include any transferee of such decree or order.

“Written” and “writing” include “printed” and “print” and “lithographed” and “lithograph” respectively.

“Signed” includes “marked” when the person making the mark is unable to write.

“Foreign court” means a court situate beyond the limits of, and not having authority in, Ceylon.

“Foreign judgment” means the judgment of a foreign court.

An order to be treated as such must be formally drawn up and recorded as required by the Code [*In re the Last Will of Ferdinandus*, 1 N. L. R. 245].

OF ACTIONS IN GENERAL.

General Provisions.

6 Every application to a court for relief or remedy obtainable through the exercise of the court's power or authority, or otherwise to invite its interference, constitutes an action.

7 The procedure of an action may be either *regular* or *summary*.

Illustration.

In actions of which the procedure is regular, the person against whom the application is made is called upon to formally state his answer to the case which is alleged against him in the application before any question of fact is entertained by the court, or its discretion thereon is in any degree exercised.

In actions of which the procedure is summary, the applicant simultaneously with preferring his application supports with proper evidence the statement of fact made therein; and if the court in its discretion considers that a *prima facie* case is thus made out—

PART 1.

Chapter 2.

Definition :
Action.

Procedure :
to be regular
or summary.

- (a) Either the order sought is immediately passed against the defendant before he has been afforded an opportunity of opposing it, but subject to the expressed qualification that it will only take effect in the event of his not showing any good cause against it on a day appointed therein for the purpose;
- (b) Or a day is appointed by the court for entertaining the matter of the application on the evidence furnished, and notice is given to the defendant that he will be heard in opposition to it on that day if he thinks proper to come before the court for that purpose.

[See chapter 24—from section 373].

Procedure of
action to be
ordinarily
regular.

8 Save and except actions in which it is by this Ordinance specially provided that proceedings may be taken by way of summary procedure, every action shall commence and proceed by a course of regular procedure, as hereinafter prescribed.

Chapter 3.

Of the Court of Institution of Action.

Institution of
actions :
In what
court.

9 Subject to the pecuniary or other limitations prescribed by any law, actions shall be instituted in the court within the local limits of whose jurisdiction—

- (a) A party defendant resides ; or
- (b) The land in respect of which the action is brought lies or is situate in whole or in part ; or
- (c) The cause of action arises ; or
- (d) The contract sought to be enforced was made.

When one of
two or more
courts may
entertain an
action.

When it is alleged to be uncertain within the local limits of the jurisdiction of which of two or more courts any immovable property is situate, any one of those courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect, and thereupon proceed to entertain and dispose of any action relating to that property ; and its decree in the action shall have the same effect as if the property were situate within the local limits of its jurisdiction. Provided that the action is one with respect to which the court is competent as regards the nature and value of the action to exercise jurisdiction.

The provision in "The Courts Ordinance" as to the jurisdiction of District Courts is that every District Court shall have cognizance of and full power to hear and determine all pleas, suits, and actions in which a party defendant shall be resident within the district in which any such suit or action shall be brought, or in which the cause of action shall have arisen within such district, or where the land in respect of which the action is brought lies, or is situate wholly or partly within such district [sect. 65, p. 183 *ante*].

Under the Indian Code [sect. 16] suits touching immovable property and movable property actually under distraint or attachment are to be instituted in the court within the local limits of whose jurisdiction the property is situate.

All other suits are to be instituted [sect. 17] in a court within the local limits of whose jurisdiction—

- (a) The cause of action arises ; or
- (b) All the defendants, at the time of the commencement of the suit, actually and voluntarily reside, or carry on business, or personally work for gain ; or
- (c) Any of the defendants, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that either the leave of the court is given or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution.

In an explanatory paragraph, in suits arising out of contract, the cause of action is said to arise within the meaning of this section at any of the following places, namely :—

- (1) The place where the contract was made ;
- (2) The place where the contract was to be performed or performance thereof completed ;
- (3) The place where in performance of the contract any money to which the suit relates was expressly or impliedly payable.

"A party defendant resides."—Where a plaintiff relies for a court's jurisdiction on the residence of the defendant within the territorial limits of the court, the fact of such residence must be distinctly averred, and it is not sufficient to describe the defendant as of such and such a place within such limits [*Sulaiman v. Ibrahim*, 9 S. C. C. 131].

An action in which a claim to recover land from a party in wrongful possession is joined with an alternative claim against the vendor of the land to plaintiff, for refund of the price upon failure to warrant and defend the title conveyed, may properly be brought in the court having jurisdiction over the

vendor, although such court would have had no jurisdiction over the land or the party in possession if sued alone [*Fernando v. Waas*, 9 S. C. C. 189].

"The cause of action arises."—A court has no jurisdiction by reason only of a part of the cause of action having arisen within its jurisdiction. Where a cause of action has arisen within the jurisdiction of more than one court, the court having jurisdiction to try the case must depend upon where the defendant resides, or where the land in respect of which the action is brought is situate, or where the contract sought to be enforced was made [*Ranatte v. Sirimal*, 1 S. C. R. 58].

By a written agreement executed by the plaintiffs (father and daughter) at Chilaw and by the defendant in Colombo, it was agreed that the defendant should marry the second plaintiff at Chilaw. In an action for damages for breach of promise of marriage, the breach alleged was that the defendant had married another person in Colombo.—*Held*, that the District Court of Chilaw had no jurisdiction; that the cause of action was the marriage of the defendant to a third person in Colombo; and that the action should have been instituted in the District Court of Colombo [*Paulickpulle v. Casie, Chetty*, 1 C. L. R. 102].

The mere fact of the endorsement of a promissory note within the jurisdiction of a court does not give that court jurisdiction in an action by the endorsee against maker [*Narayen v. Fernando*, 2 C. L. R. 30].

The place where a party defendant carries on business is not a place where he resides within the meaning of this section [*Kanappa v. Saibo*, 2 C. L. R. 37].

A, a resident at Matara, purchased land situate at Matara which had been mortgaged by a bond executed at Tangalla. The mortgagee sued the mortgagor at Tangalla, making A also a party to the action.—*Held*, that the District Court of Tangalla had no jurisdiction to entertain the action as against A [*Tirimandura v. Dissanaike*, 2 N. L. R. 290].

A *hundi* drawn at Benares on the drawer's firm at Bombay in favour of a firm at Mirzapur and Calcutta was endorsed at Calcutta by the payee to a firm at Calcutta, and dishonoured by the drawer's firm at Bombay. In a suit brought in Calcutta by the endorsee to recover the value of the *hundi*, the defence was raised that the court had no jurisdiction to entertain the suit.—*Held*, that the endorsement having taken place in Calcutta, part of the cause of action arose there so as to give the court jurisdiction [*Roghoonath v. Gobindnath*, I. L. R. 22, Cal. 451].

Of applications for withdrawal and transfer of actions.

10 Any of the parties to an action which is pending in any original court may, before trial, and after notice in writing to the other parties of his intention

so to do, apply to the Supreme Court in manner in section 46 of "The Courts Ordinance, 1889," prescribed, for the withdrawal of such action from the court in which it is pending, and for the transfer of it for trial to any other court competent to try the same in respect of its nature and the amount or value of its subject-matter. And the Supreme Court may, on any such application, after hearing such of the parties as desire to be heard, and on being satisfied that such withdrawal and transfer are desirable for any of the reasons given in that section, withdraw any such action pending in any such court, and transfer it for trial to any other such court as aforesaid, upon any terms that the said Supreme Court shall think fit. When the action might have been instituted in any one of several courts, the balance of convenience only shall be deemed sufficient cause for such withdrawal and transfer to one of the alternative courts.

In no case in which any action is so transferred as aforesaid from one court to another shall any stamp fee be leviable in the court to which the action is transferred on any pleading or exhibit on which the proper stamp fee has been paid in the court from which the action is so transferred. Stamp duty.

Of Parties and their Appearances, Applications, and Acts. Chapter 4.

11 All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative, in respect of the same cause of action. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief for such relief as he or they may be entitled to, without any amendment of the plaint for that purpose. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who is not found entitled to Plaintiffs.

relief, unless the court in disposing of the costs of the action otherwise directs.

This section is the same as section 26 of the Indian Code.

The corresponding rule in England is Rule 1 of Order 16 under the Judicature Acts. That, however, is not limited by the words "same cause of action." These words mean not only the act complained of, but the right violated [*Nusserwanji v. Gordon*, I. L. R. 6, Bom. 266, p. 275]. Reading this section with section 36, it appears that the Code does not authorise the joining of plaintiffs in a suit in respect of distinct causes of action in which they are not jointly interested, and their interests are not merely conflicting, but antagonistic [see O'K. p. 61]. The words "in the alternative" apply to cases in which there is doubt as to the person entitled to sue upon the cause of action [*Lingammal v. Venkatammal*, I. L. R. 6, Mad. 239, p. 243]; and if one of two plaintiffs can sue for the claim, and the second plaintiff is added as a matter of caution, there is no misjoinder [*Bachubai v. Shamji*, I. L. R. 9, Bom. 536, p. 547]; but where thirteen persons who were committed to jail under one warrant sued jointly seeking damages for illegal detention, the plaint was taken off the file [*Ali Serang v. Beadon*, I. L. R. 11, Cal. 524]. Where the managers of a temple passed a rule restraining the right of persons to enter the temple it was held all could join in the suit for an injunction [*Kalidas v. Gor Parjaram*, I. L. R. 15, Bom. 309].

In a suit against a company and its directors by the agents, two of whom were shareholders, the plaintiffs were not allowed to join a cause of action based on the agreement with a cause of action common to only two as shareholders [*Nusserwanji v. Gordon*, I. L. R. 6, Bom. 266, p. 275].

Several persons can join in a suit under section 639 *infra* [see O'K. 61].

One of several mortgagees or trustees can maintain a suit, making the others co-defendants, if they are unwilling to be joined as plaintiffs, or have done some act which precludes them. [*Luke v. South Ken. Hot. Co.*, 7 C. D. 789; 11 C. D. 12; *Kalidas v. Nathu*, I. L. R. 7, Bom. 217]. Where persons who have a joint interest with the plaintiff are made defendants, there must be an allegation in the plaint that they had refused to join [*Dinarkanath Mitter v. Tara Prosunna*, I. L. R. 17, Cal. 160].

Where a document creates a joint obligation, all the parties should be on the record [*Gopal Chundar Gooahoo v. Juggudumba Dossia*, 10 W. R. 411]; and it is the same if the obligation is created by law [see *Khandya Lal v. Chandar*, I. L. R. 7, Alla. 313]; but a surviving partner can sue for a partnership debt [*Gobind v. Chandar*, I. L. R. 9, Alla. 486].

A suit for the price of goods supplied to a member of a non-proprietary club cannot be brought in the name of the secretary. [*Michael v. Briggs*, I. L. R. 14, Cal. 362].

Under the English rule [R. 1, O. 16] it has been held that eight persons might rightly join in one action of libel, although no joint injury was shown [*Booth v. Briscoe*, 2 Q. B. D. 496 ; and see *Viscount Gort. v. Rowney*, 17 Q. B. D. 625].

12 Where two or more persons are entitled to the possession of immovable property as joint tenants or tenants in common, one or more of them may maintain an action in respect of his or their undivided shares in the property in any case where such an action might be maintained by all.

Where joint tenants or tenants in common.

13 Where an action has been instituted in the name of the wrong person as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the action, if satisfied that the action has been so commenced through a *bonâ fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person or persons, with his or their consent, to be substituted or added as plaintiff or plaintiffs, upon such terms as the court thinks just.

Substituted and added plaintiffs

This section is the same as section 27 of the Indian Code. The corresponding rule under the Judicature Acts is R. 2, O. 16.

A court is not given by this section unlimited power to remodel the proceedings [*Turquand v. Fearon*, 4 Q. B. D. 280].

A plaintiff can only be added under this section where there has been a *bonâ fide* mistake. Where certain parties having only an expectation, and not an interest, brought an action for administration, the persons directly interested not being parties and apparently objecting, it was held this section did not apply [*Clowes v. Hilliard*, 4 C. D. 413]. The mistake may be of law as well as of fact [see *Duckett v. Gover*, 6 C. D. 82 ; *Mason v. Harris*, 11 C. D. 106].

Where a person has been made a plaintiff under this section, a motion to strike out his name can only be made by himself [see *Duckett v. Gover*, 6 C. D. 82 ; *Inloopottee v. Chunder*, 9 W. R. 309].

Where it was doubtful whether a road contractor or the vestry ought to sue a Tramway Co. which had injured the road,

the vestry was added as a co-plaintiff [*Val de Travers Asphalte Co. v. Lond. Tramways Co.*, 48 L. J. C. P. 312].

A plaintiff who has no right to sue cannot amend by joining as co-plaintiff a person who has such right [*Walcott v. Lyons*, 29, O. D. 584].

A new plaintiff cannot be substituted for the original plaintiff except by the consent of the original plaintiff [*Emden v. Carte*, 17 C. D. 169].

In England the application under Rule 2 can only be made by a plaintiff [*Wilson v. Church*, 9 C. D. 552].

Defendants.

14 All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, in respect of the same cause of action. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment.

This section is substantially the same as section 28 of the Indian Code, the only difference being that the words "in respect of the same cause of action" have been substituted here in place of the words "in respect of the same matter" in the Indian Code. The corresponding rule under the Judicature Acts is R. 4, O. 16.

"In the alternative."—A claim to recover land from a party in wrongful possession may be joined with an alternative claim against the vendor of the land to plaintiff for refund of the price upon failure to warrant and defend the title conveyed [*Fernando v. Waas*, 9 S. C. C. 189].

A trespasser without title cannot be joined as defendant in a partition suit [*Deparis v. Christian*, 1 S. C. R. 211].

Persons against whom no relief is asked in respect to the matter should not be made parties for the purposes of discovery or to make them pay costs [*Barstall v. Beyfus*, 26 C. D. 35, p. 40].

The result of this section when read with section 11 is to enable all persons who make claim or against whom claim is made in respect of any right jointly or severally or in the alternative to be made plaintiffs or defendants respectively, and judgment to be given for one or more of the plaintiffs against one or more of the defendants according to their respective liabilities [*Bungsee Singh v. Soodish Lall*, I. L. R. 7, Cal. 740, p. 745]. When two or more plaintiffs sue jointly the defendant may set off against each individual separate ascertained sums [*The M. S. & L. Railway Co. and the N.-W. Railway Co. v. Brooks*, 2 Ex. D. 243].

Where a plaintiff claimed certain properties attached as his purchased properties, but his claim being disallowed the properties

were sold in five lots to different persons, he was allowed to sue them together [*Hira Lal v. Prosunno*, 12 Cal. L. R. 556 ; but see *Ram Narain v. Annoda*, I. L. R. 14, Cal. 681]. A charterer may sue both owner and master on a charter-party entered into with the owner's agent [*Hasonbhoy v. Clapham*, I. L. R. 7, Bom. 51]. Defendants cannot be joined unless the relief sought against all of them is in respect of the same subject-matter [*Narsing v. Mangal*, I. L. R. 5, Alla. 163 ; *Indar v. Prasad*, I. L. R. 11, Alla. 33].

A party may be added as a defendant, although the relief prayed against him be inconsistent with the alternative relief prayed against the other defendant [*Child v. Stemming*, 5 C. D. 695 ; *Buddree Doss v. Hoare Miller & Co.*, I. L. R. 8, Cal. 170]. An alternative relief may be claimed against one or more of the defendants [*Rajdhur v. Kali Krishna*, I. L. R. 8, Cal. 963].

A leased certain lands to B for a term and afterwards sold to D, who became entitled to the rents from a certain date. D applied for payment to B, who said he had paid the whole in advance to A.—*Held*, D could sue A and B for the rent, praying a decree for rent against B or a decree against A, if B's allegation was correct [*Madan Mohun v. Holloway*, I. L. R. 12, Cal. 555]. As to alternative claim against defendants, see further *Honduras Ry. Co. v. Tucker*, 2 Ex. D. 301.

Several persons may be sued in one action for a joint assault [*Ramessur Bhattachargee v. Shib Narain*, 14 W. R. 419], and so may joint trespassers [*Sheikh Omur v. Sheikh Welayet*, 4 Cal. L. R. 455].

15 The plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange and promissory notes.

Who may be joined as parties defendant.

Same as section 29 of the Indian Code. The corresponding rule under the Judicature Acts is R. 5 of O. 16 [see section 120 of the N. Y. Procedure Code].

Under this section the executor of a deceased person who was a party to a joint and several promissory note can be joined with the surviving party in an action by the holder of the note [*Muttiah Chetty v. De Silva*, 2 N. L. R. 109].

The drawer and acceptor of a bill of exchange can be joined as defendants in a suit brought by the holder [*Pestonjee v. Mirza Mahomed*, I. L. R. 3, Cal. 541].

16 Where there are numerous parties having a common interest in bringing or defending an action, one or more of such parties may, with the permission

Where several parties, one may sue or defend for all. Notice.

of the court, sue or be sued, or may defend in such an action on behalf of all parties so interested. But the court shall in such case give, at the expense of the party applying so to sue or defend, notice of the institution of the action to all such parties, either by personal service or (if from the number of parties or any other cause such service is not reasonably practicable, then) by public advertisement, as the court in each case may direct.

This section, with a slight variation in phraseology, is the same as section 30 of the Indian Code. The corresponding rule under the Judicature Acts is R. 9 of O. 16.

The court may, under this section, permit one or more members of a voluntary association to sue on behalf of all, where it is practically impossible for the whole body to appear as plaintiffs, but such an association cannot by agreement among its members give any individual the right to sue on their behalf [*Read v. Samsudin*, 1 N. L. R. 292].

In the case of a small estate, when there are several next of kin having a common interest in a promissory note of which the intestate was the holder, one of them may apply under this section for permission to sue [*Punchi Nona v. Adris Appu*, 1 Tamb. Rep. 46].

This section does not enable a person to sue on behalf of the general public. Thus it will not support an action to set aside an obstruction in a public highway without proof of special damage [*Adamson v. Aramugam*, I. L. R. 9, Mad. 463 ; *Siddeswara v. Krishna*, I. L. R. 14, Mad. 177. See, however, *Chuni v. Ramkishen*, I. L. R. 15, Cal. 460]. Moreover, the plaintiff must have himself a cause of action and in the same interest [*Rajhubar Dias v. Kesho Ramamy*, I. L. R. 11, Alla, 18 ; *Ravoga v. Rajaratnam*, I. L. R. 14, Mad. 57].

If the court's permission has not been previously obtained, the suit will be dismissed [*Jan Ali v. Atavur*, 9 Cal. L. R. 433 ; *Lutifunmissa v. Naziran*, I. L. R. 11, Cal. 33].

It is essential that the parties should be numerous : twenty have not been sufficient [*Harrison v. Stewardson*, 2 Hare, 530].

The parties must have the same interest [See *Worraker v. Pryer*, 2 C. D. 109 ; *Woolridge v. Nones*, L. R. 6, Eq. 410 ; *Geereeballa v. Chunder Kant*, I. L. R. 11, Cal. 213]. Some of the proprietors of a trading concern may sue, on behalf of themselves and others, for an account against their co-partners [*Chancy v. May*, Prec. in Ch. 592], and the owner of land against one villager for himself and others asserting a right of way [*Chuni v. Ramkishen*, I. L. R. 15, Cal. 460].

If any of the persons whom plaintiff claims to represent consider that he does not represent him, his proper course is to apply to be put on the record, and then he can apply to get rid of any order he may think injurious to him, or to take the conduct of the case out of the plaintiff's hands [*Watson v. Cave*, 17 C. D. 19; *Fraser v. Carpen*, 21 C. D. 718].

One member of a corporation can sue on behalf of himself and others to restrain the commission of an act which is *ultra vires* [*Bloxam v. Met. Railway Co.*, L. R. 3 Ch. App. 337; *Hoole v. Great Western Railway Co.*, L. R. 3 Ch. App. 262]; or if the majority and directors are using their power for the purpose of doing something fraudulent against the minority [*Atwood v. Merryweather*, L. R. 5, Eq. 464, note; *Mason v. Harris*, 11 C. D. 97]. And one director can sue the others in his own name on the ground of individual injury, if they wrongfully restrain him from acting as director [*Pulbrook v. Richmond Consolgd. Mg. Co.*, 9 C. D. 610]. But in all other cases the corporate body must sue [*Gray v. Lewis*, L. R. 8 Ch. App. at 1,051].

If the parties have not the same interest in the suit this procedure cannot be adopted [*Jones v. Garcia del Rio*, 1 T. & R. 297; *Hollows v. Ferme*, 3 Ch. App. 471].

This section does not apply to a case in which individual rights have been violated, but there are not many persons *jointly* interested in obtaining relief, such as the right of a person to use a mosque for prayer [*Jawahra v. Akbar*, I. L. R. 7, Alla. 178. See, however, *Jan Ali v. Ram Nath*, I. L. R. 8, Cal. 32]; nor to the case where one of numerous co-sharers sues to prevent some of them retaining exclusive possession of the joint property [*Hira Lal v. Bhairon*, I. L. R. 5, Alla. 602].

This procedure cannot be applied in suits for partition [*Pahaladh Singh v. Luchmanbutty*, 12 W. R. 256].

In the case of defendants, too, they must be numerous, and there must be an averment in the plaint that the suit is brought against them personally and on behalf of the others [*Lanchester v. Thompson*, 5 Mad. 13]. The number of defendants named must be so large that it can be justly said they will fairly and honestly try the legal right between themselves and all other persons interested and the plaintiff [*Adair v. New River Co.*, 11 Ves. 444]. Where fifteen hundred persons had a claim against a person for costs which depended on the same question, namely, the validity of certain certificates, it was held that he could file a bill against some of them to restrain the proceedings of all until the validity of the claims had been decided [*Sheffield Waterworks v. Yeomans*, L. R. 2 Ch. App. 8].

If a person interested in the suit contends that the defendant does not represent him, he should apply to be made a defendant [*Fraser v. Coopers*, 21 C. D. 718].

Where there are several next of kin having a common interest in a debt due to an intestate estate of small value, one of them may apply under this section for permission to sue on behalf of all [*Punchi Nona v. Adris Appu*, 1 Tamb. Rep. 46].

Misjoinder
not to defeat
action.

17 No action shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

Nothing in this Ordinance shall be deemed to enable plaintiffs to join in respect of distinct causes of action.

If the consent of any one who ought to be joined as a plaintiff cannot be obtained, he may be made a defendant, the reasons therefor being stated in the plaint.

The first two paragraphs of this section form section 31 of the Indian Code, and the corresponding rule under the Judicature Acts is R. 11, O. 16.

The meaning of this section has been interpreted to be that where a non-joinder is apparent in the face of which the court cannot proceed, the court, instead of dismissing the plaintiff's action, should allow the plaintiff to add parties [*Banda v. Lapaya*, 1 S. C. R. 98 ; 2 C. L. R. 38]. Where a debt is payable by defendants to plaintiffs and others as joint creditors, the defendants have, notwithstanding the provisions of this section, a right to object to being sued by the plaintiffs only for the share of the debt due to them, and they have a right to claim to have all the creditors joined, and to be sued in one action [*Ibid*].

In an action to realise a mortgage in favour of two persons, where one refuses to join the other as plaintiff in bringing the action, one mortgagee may, independently of the provisions of this section, sue alone, making the other a party defendant. In such a case the plaintiff may sue for the whole debt [*Gunewardene v. Jayesundere*, 1 C. L. R. 85 ; *Ranmenika v. Vanderput*, 2 C. L. R. 138].

If there is a misjoinder, both of parties and causes of action, the suit should be dismissed [*Ram Narain v. Annoda*, 1 L. R. 14, Cal. 681].

In certain classes of suits the plea of non-joinder, if raised in time, is fatal, such as a suit on a joint contract and all the contractors are not parties [*Ramsebuk v. Ramlall*, 1 L. R. 6, Cal. 815], or only three out of four managers sue for trust property, and the fourth has not been put on the record [*Rajendronath v. Shaikh Mahomed*, 1 L. R. 8, Cal. 42].

The second paragraph of this section forbids the joinder of the respective occupiers of several houses in one action for a nuisance [*Hudson v. Madison*, 12 Sim. 416].

Where a plaintiff, alleging himself to be entitled on the death of a Hindu widow to the possession of certain immovable property, brought upon the death of such widow a joint suit against three sets of defendants, being persons to whom the widow in her lifetime had by separate alienations transferred separate portions of the property claimed, *held*, that such suit was bad for misjoinder of both parties and causes of action [*Ganeshi Lal v. Khairati Singh*, I. L. R. 16, Alla. 279].

Where two plaintiffs joined in a suit for the recovery of immovable property, the one claiming a title by inheritance and the other a title by assignment from the first plaintiff, it was held that the suit was bad for misjoinder of causes of action [*Rahim v. Amiran*, I. L. R. 18, Alla. 219].

Several creditors to each of whom separate debts are owing by the same debtor cannot sue jointly for the avoidance of a deed of gift executed by the debtor, which deed is alleged to have been made fraudulently with intent to defeat or delay the executant's creditors, the cause of action of each separate creditor not being the same as that of the others [*Rajjo Kuar v. Debi Dial*, I. L. R. 18, Alla. 432].

18 The court may, on or before the hearing, upon the application of either party, and on such terms as the court thinks just, order that the name of any party, whether as plaintiff or as defendant improperly joined, be struck out; and the court may at any time, either upon or without such application, and on such terms as the court thinks just, order that any plaintiff be made a defendant, or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added.

Parties
(improperly
joined) may
be struck out,
or added.

Every order for such amendment or for alteration of parties shall state the facts and reasons which together form the ground on which the order is made. And in the case of a party being added, the added party or parties shall be named, with the designation "added

party," in all pleadings or processes or papers entitled in the action, and made after the date of the order.

This section is the same as paragraphs 1 and 2 of section 32 of the Indian Code (see O. 16, Rules 11 and 13 under the Judicature Acts).

The proceeding under this section should be the same as that followed in England in applications under Order 16 of the Orders under the Judicature Acts. The party applying should first obtain *ex parte* an order giving leave to serve a notice on the person he seeks to bring in, after which the question whether such person ought to be joined may be considered in the presence of the parties to the action and of such person [*Loos v. Scharenguivel*, 9 S. C. C. 143 ; 1 C. L. R. 47].

The court may call in aid the provisions of this section to give a person named by a defendant in a partition suit as one having an interest in the land sought to be partitioned, an opportunity to establish his claim [*Ratwatte v. Banda*, 1 S. C. R. 345].

Where the plaintiff in a suit sued the defendant for a share of certain lands, *held*, that third persons who claimed the whole land adversely to the plaintiff were not interested in any question involved in the action within the meaning of this section, and have no right to claim to be added as parties [*Appuhamy v. Lokuhamy*, 2 C. L. R. 57 ; see also *Wijeratne v. Ensohamy*, 2 C. L. R. 157].

No person can intervene in a proceeding under "The Land Acquisition Ordinance, 1876," otherwise than as provided in this section [*Templer v. Seneviratne*, 2 C. L. R. 70].

Intervention in a pending action can only be permitted in pursuance of, and in conformity with, the provisions of this section. The addition of parties on their own application whose presence is not necessary for the purposes mentioned in this section is, therefore, irregular [*Punchirala v. Punchirala*, 2 C. L. R. 84].

The form of the order under this section should be one directing the plaint and summons to be amended by the addition of the names of the added parties, and directing the plaintiff to cause those parties to be duly served with copies of the summonses and of the plaint further amended as the plaintiff might be advised within a certain time from the date of the order. It is irregular to order the case to be taken off the trial roll for this purpose [*Wijeratne v. Ensohamy*, 2 C. L. R. 157].

This section corresponds with the language of Rule 11, Order 16, under the Judicature Acts, and in its interpretation effect must be given to the principle that, whenever a court can see in the transactions brought before it that the rights of some of

the parties may or will be probably affected, the court shall have power to bring all the parties before it, and determine all their rights by one trial, in order that the cost of litigation may be diminished as much as possible [*Meideen v. Banda*, 1 N. L. R. 51].

The court may use the power vested in it by this section to bring in all the owners, who can be found, of the land sought to be partitioned, as parties to the action [*Peris v. Perera*, 1 N. L. R. 362].

All persons having an interest in the object of the suit, and in whose absence the subject-matter of the suit cannot be fully investigated and disposed of, ought to be made parties, so that the questions raised in it shall not be raised again between the parties to the suit or any of them and third parties [*Vydianadayyan v. Sitaramayyan*, I. L. R. 5, Mad. 52]; and that a person whose interests might in any way be affected should be put on the record [*Ahmedbhoy v. Vulleebhoy*, I. L. R. 8, Bom. 323]; but a person who has no interest, against whom there can be no relief given, ought not to be a party [*Khajab Abdul Gunnee v. Pogose*, 12 W. R. 436]. Persons should not be made co-plaintiffs unless their cause of action is the same as that of the other plaintiffs [*Government v. Bourie Bhoomiz*, 2 W. R. 280]. Thus, a person claiming adversely to both plaintiff and defendant should not be made a party [*Joy Gobind v. Goureeproshad*, 7 W. R. 202].

The words "questions involved in the suit" must be taken to mean questions directly arising out of and incident to the original cause of action in which the person proposed to be joined has an identity or community of interest with one or other of the parties [*Naraini Koer v. Durgan Koer*, I. L. R. 2, Alla. 738].

No new cause of action should be introduced [*Dalton v. Guardians, &c.*, 47 L. T. 349; *Moharanee Surna Moyee v. Bykunt Chunder*, 25 W. R. 17].

In a suit for damages by the purchaser of goods by sample, an application of the vendors to have their vendor on the same samples made a party was refused [*Mahomed Badsha v. Fleming*, I. L. R. 4, Cal. 355].

The nature of the suit should not be changed [*Oh Ling Tee v. Aukiniffee*, 10 W. R. 86]; and so, where one person sues for himself and others, the names of the parties jointly interested will not be added [*De Hart v. Stevenson*, Weekly Notes, 1876, p. 83].

A party must be added if the action cannot go on without so doing [*Ramsebuk v. Ramlall*, I. L. R. 6, Cal. 815; *Rajendronath v. Shaik Mahomed*, I. L. R. 8, Cal. 42], and the action must be dismissed. He should, at least, be made a defendant [*Juggodumba*

Dassee v. Haran Chunder, 10 W. R. 109], provided objection has been taken by any of the parties [*Shirekuli v. Ajjibal*, I. L. R. 15, Bom. 297].

Where the plaintiff has assigned a share in the proceeds of a suit, and the agreement is not void, the defendant can apply to have the assignee made a party [*Chander Kant Mookerjee v. Ram Coomar*, 13 B. L. R. 530 ; 2 App. Cas. 186].

In a suit between parties, each contending that he is the judgment-creditor, the judgment-debtor need not be made a party [*Abdool Gunnee v. Pogose*, 12 W. R. 436].

An application may be made *ex parte* to add parties [Weekly Notes, 1876, p. 23], but not if it be to strike out or change the parties on the record [*Pildesley v. Harper*, 3 C. D. 277]. In the case of a plaintiff consent is necessary [*Omasundari Dasi v. Ramji*, 9 Cal. L. R. 13].

On the application of either party at or before the first hearing, the name of any person improperly joined may be struck out [*Khadar v. Chotbibi*, I. L. R. 8, Bom. 616].

All the evidence produced by the party whose name has been struck out should be removed from the record [*Bucha Singh v. Mirza Mashook Ali*, 15 W. R. 572]. If when a name is struck out the court has not jurisdiction to try the case, the plaint should be returned to be presented in the proper court [*Shrindar v. Chima*, 10 Bom. 17].

Courts should not dismiss an action merely on account of defect of parties, but should exercise the discretion vested in them by this section [*Ruchponil v. Johuree*, 2 Agra 147 ; *Vydiadayana v. Sitaramayyan*, I. L. R. 6, Mad. 52].

In considering the question of joining parties under this section, the point to be really considered is whether there is such a question in the case which can advantageously be tried and decided not only as between the plaintiffs and the defendants, but as between the defendants and the third party [*The Swansea Shipping Co., Ltd., v. Duncan, Fox & Co.*, 1 Q. B. D. 644]. If there is a material common question which it is important to have tried once for all, the court has power to make an order that a third party shall be bound by the trial of that particular question, even though he is not interested in the whole subject-matter of the action. But this power is a discretionary one, and in the exercise of its discretion the court ought to consider whether the plaintiff's interests will be prejudiced or affected ; and if the plaintiff will be prejudiced or delayed, the power ought not to be exercised [*Bower v. Hartley*, 1, Q. B. D. 652].

As a rule, amendment under this section should not be allowed at a late stage of the case [*London & Bombay Bank v. Bhanji*, I. L. R. 3, Bom. 116].

One of several plaintiffs can appeal, making those who decline to concur respondents [see *Bocket v. Attwood*, 18 C. D. 54].

Under the Indian Procedure an appeal lies from an order under section 32 of the Indian Code striking out or adding the name of any person as plaintiff or defendant, but not from an order refusing to make a person a party [*Karman Bibi v. Misri Lal*, I. L. R. 2, Alla. 904; *Ahirunnisa v. Konurunissa*, I. L. R. 13, Cal. 100]; and from an order making a plaintiff defendant [*Lukshmana v. Paramasiva*, I. L. R. 12, Mad. 489]. Where there is no appeal the order may be attacked in appeal from the final decree [*Googlee Sahoo v. Premall*, I. L. R. 7, Cal. 148] if the order has affected the decision on the merits or the jurisdiction of the court [*Har Narain v. Kharag*, I. L. R. 9, Alla. 447].

"Prescription."—When a person is added as a co-plaintiff limitation is counted against him down to the date of the institution of the suit only [*Kalee Kishore v. Luckhee Debia*, 6 W. R. 172]. A plaintiff should not be added whose right is barred [*Kishen Lal v. Chunder*, W. R. 1864, p. 152]; and where two defendants were made plaintiffs at a time when if they had sued their claim would have been barred, the order was set aside as illegal [*Krishna v. Collector of Salem*, I. L. R. 10, Mad. 44]; but the plea must be raised on the first opportunity [*Shirekuli v. Ajjibal*, I. L. R. 15, Bom. 297]. It was held in *The Oriental Bank v. Charriot* [I. L. R. 12, Cal. 642] that where the court exercised the powers conferred upon it by the latter part of this section, limitation did not apply.

19 No person shall be allowed to intervene in a pending action, otherwise than in pursuance of, and in conformity with, the provisions of the last preceding section. And no person shall be added as plaintiff, or as the next friend of a plaintiff, without his own consent thereto.

Intervention
not otherwise
allowed.

Provided however that any person on whose behalf an action is instituted or defended under section 16 may apply to the court to be made a party, and all parties whose names are so added as defendants shall be served with a summons in manner hereinafter mentioned, and the proceedings as against them shall be deemed to have begun only on the service of such summons.

Except in
cases under
section 16.

The provision in the opening lines of this section is peculiar to our Code. It has been inserted in view of the old procedure

of intervention. The rest of the section is substantially the same as paragraphs 2, 3, and 4 of section 32 of the Indian Code. The decision under the Indian Code that a person not a party may apply to be added [*Athiappa v. Ayanna*, I. L. R. 8, Mad. 300 ; *Oriental Bank v. Charriot*, I. L. R. 12, Cal. 642 ; *Babbaba v. Noorjehan*, I. L. R. 13, Cal. 90] would, notwithstanding the provision aforesaid, appear to have place in our procedure. A plaintiff, applying under this section to join another as co-plaintiff, must have a cause of action [*Dwarkanath v. Grischunder*, I. L. R. 6, Cal. 827 ; *Chunder Coomar v. Gocool Chunder*, I. L. R. 6, Cal. 370].

In consequence of the splitting up of section 32 of the Indian Code into two separate sections in our Code—sections 18 and 19—the provision as to commencement of an action at the end of this section—section 19—would seem to apply to only defendants to be added in terms of the proviso to this section, while under the Indian Code the decisions show that it applies to defendants added under other parts of section 32 as well.

The ruling in *Manni Kasaundhan v. Crooke* [I. L. R. 2, Alla, 296], that limitation does not apply where a corporation is sued in the name of the wrong officer, would seem to be applicable to our procedure as well.

The application to be added as parties under section 18 is in the nature of an intervention under the old procedure which has been abolished by this section [*Appuhamy v. Lokuhamy*, 2 C. L. R. 57].

Conduct of
the action.

20 The court may give the conduct of the action to such plaintiff as it deems proper.

This is the last paragraph of section 32 of the Indian Code.

Amendment
of plaint.

21 Where a defendant is added, the plaint shall, unless the court direct otherwise, be amended in such manner as may be necessary, and a copy of the amended plaint shall be served on the new defendant and on the original defendants.

This section is substantially the same as section 33 of the Indian Code (see O. 16, R. 13, under the Judicature Acts).

Objections for
non-joinder
or misjoinder
to be taken
before
hearing.

22 All objections for want of parties or for joinder of parties who have no interest in the action, or for misjoinder as co-plaintiffs or co-defendants, shall be taken at the earliest possible opportunity, and in all

cases before the hearing. And any such objection not so taken shall be deemed to have been waived by the defendant.

This section is the same as section 34 of the Indian Code (see O. 16, R. 12, under the Judicature Acts).

If an objection is taken in time, and the court finds that the suit has been carried on without adding necessary parties, it must be dismissed. [*Ramsebule v. Ramlall*, I. L. R. 6, Cal. 815; *Kalidas v. Nathu*, I. L. R. 7, Bom. 217].

If a judge finds that in a question concerning parties the objection raised is valid, he should act under section 18 and not dismiss the action [see *Van Gelder v. Sowerby*, 44 C. D. 374].

23 When there are more plaintiffs than one, any one or more of them may be authorised by any other of them to appear, plead, or act for such other in any proceeding under this Ordinance, and in like manner when there are more defendants than one, any one or more of them may be authorised by any other of them to appear, plead, or act for such other in any such proceeding. The authority shall be in writing, signed by the party giving it, and shall be filed in court.

Plaintiffs (or defendants) may authorise one of them to act for them.

This section is the same as section 35 of the Indian Code.

Of Recognised Agents and Proctors.

Chapter 5.

24 Any appearance, application, or act in or to any court, required or authorised by law to be made or done by a party to an action or appeal in such court, except only such appearances, applications, or acts as by any law for the time being in force only advocates or proctors are authorised to make or do, and except when by any such law otherwise expressly provided, may be made or done by the party in person, or by his recognised agent, or by a proctor duly appointed by the party or such agent to act on behalf of such party: Provided that any such appearance shall be made by the party in person, if the court so directs. An advocate, instructed by a proctor for this purpose, represents the proctor in court.

Appearances may be by party in person, his recognised agent, or proctor.

This section is substantially the same as section 36 of the Indian Code.

To an application by a proctor to draw money deposited to the credit of his client, the latter's consent must be proved, apart from the general authority given to the proctor in his proxy [*Gunewardene v. Perera*, 1 S. C. R. 78].

A Joint Stock Company being a corporation aggregate which cannot appear in an action is outside the provisions of this section. Except as provided by special enactment, a corporation aggregate can only appear to an action by an attorney appointed under its seal, or by an attorney appointed in writing by an agent empowered under the company's seal to bring or defend an action [*The Singer Manufacturing Co. v. The Sewing Machine Co.*, 2 S. C. R. 27 ; 2 C. L. R. 200 ; see *O. B. C. v. Corbett*, 4 S. C. C. 158].

The appearance of a proctor for the duly appointed proctor of a party is not an appearance of the party within the meaning of this section. Where, therefore, at the trial of an action both the plaintiff and his proctor were absent, and another proctor appearing for the plaintiff's proctor applied for a postponement, which being disallowed a final decree of dismissal of the action was entered—*Held*, that there was a default of appearance of the plaintiff, and the proper course was not to dismiss the action absolutely, but to enter a decree *nisi* under section 84 [*Habibu v. Punchi Ettena*, 3 C. L. R. 84].

A minor holding a general power of attorney for his principal abroad is competent to act as his agent for the limited purposes mentioned in this section [*Somasundaram v. Ibrahim*, 1 N. L. R. 297].

Under the section of the Indian Code it has been held that a recognised agent can file an application or enter an appearance on behalf of his principal, but he cannot institute or defend a suit nor appear in his own name [*Mokha Harakraj v. Bissessur*, 13 W. R. 344 ; *Carter v. Misree*, 2 All. 179], nor can he address the High Court as a suitor himself may do [*Prannath Chowdry v. Ganendro Mohun*, 3 W. R. 108].

Applications to sue *in forma pauperis* under section 445 cannot be made by a recognised agent [see *Devigirgura v. Sumbhagir*, 4 Bom. 91 ; *Mokha Harakraj v. Biseswur*, 5 B. L. R. App. 11 ; 13 W. R. 344].

A party can either appear in person or by a duly appointed pleader. A pleader cannot delegate his authority to another pleader [*Shivdayal v. Khetu*, I. L. R. 20, Bom. 293].

An opinion expressed by a proctor or advocate in the course of argument adversely to a claim which he undertook to advocate is not binding on his client [see *Krishnasami v. Rajagopala*, I. L. R. 18, Mad. 73].

The plaintiffs to an action must be represented by one pleader or a set of pleaders, and cannot be represented severally by different pleaders [*Jankibai v. Atmaram*, 8, Bom. 241].

25 The recognised agents of parties by whom such appearances and applications may be made or acts may be done are :—

Recognised
agents.

- (a) The Attorney-General, on behalf of the Crown in respect to any court ; who is also authorised to depute his power of appointing a proctor on behalf of the Crown in respect to any court to any person by a written document to be signed by the Attorney-General, and to be filed in that court.
- (b) Persons holding general powers of attorney from parties not resident within the local limits of the jurisdiction of the court within which limits the appearance or application is made or act done, authorising them to make such appearances and applications, and do such acts on behalf of such parties ; which power, or a copy thereof certified by a proctor or notary, shall in each case be filed in the court.
- (c) Persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance or application is made or act done, in matters connected with such trade or business only, where no other agent is expressly authorised to make such appearances and applications and do such acts.
- (d) In courts of requests, any person appointed in writing in that behalf by the Attorney-General or by any Crown counsel empowered to act within the province or district in which the court is situate, or by the government

agent or assistant government agent or collector of customs of such province or district to represent the Crown as a party plaintiff.

- (e) In courts of requests, any person specially allowed by the commissioner on sufficient cause to represent any party.

The section of the Indian Code corresponding to this is section 37.

Where an agent who brought an action did not appear to be authorised by a properly stamped power of attorney, *held*, that it was wrong to order that the plaint be taken off the file and restored to it again as from the date on which the defect was cured, inasmuch as Ordinance No. 3 of 1890 (section 31) rendered such a power valid as from the date of its execution, and the agent seemed to have acted *bonâ fide* [*Velappa v. Meydin*, 2 N. L. R. 333].

A person holding a power of attorney authorising him to appear and defend suits may act or not, as he pleases, upon the power. He is at liberty to refuse to accept service of summons. [*In re Luchnall Chund*, I. L. R. 8, Cal. 317, p. 326].

A mere servant employed to carry out orders or to execute, or a factor or commission agent who is not identified with the firm for which he acts, cannot be treated as a "recognised agent" [*Goculdas v. Ganeshlal*, I. L. R. 4, Bom. 416], nor is a political agent, as such, a "recognised agent" [*Venkutrav v. Madhavray*, I. L. R. 11, Bom. 53].

An agent cannot act under this section so long as his principal is within jurisdiction [*Bisandas v. Lakhmichand*, 6 Bom. 159].

Processes
served on
agent
effectual.

26 Processes served on the recognised agent of a party to an action or appeal shall be as effectual as if the same had been served on the party in person, unless the court otherwise directs.

The provisions of this Ordinance for the service of process on a party to an action shall apply to the service of process on his recognised agent.

This section is the same as section 38 of the Indian Code. It does not bar service of notice on the parties themselves [*Ram Lall Chowdry v. Soondery Shab*, W. R. 1864, Mis. 21].

Appointment
of proctor.

27 The appointment of a proctor to make any appearance or application, or do any act as aforesaid,

shall be in writing signed by the client, and shall be filed in court; and every such appointment shall contain an address at which service of any process which under the provisions of this chapter may be served on a proctor instead of the party whom he represents, may be made.

When so filed, it shall be in force until revoked with the leave of the court and after notice to the proctor by a writing signed by the client and filed in court, or until the client dies, or until the proctor dies, is removed, or suspended, or otherwise becomes incapable to act, or until all proceedings in the action are ended and judgment satisfied so far as regards the client.

No advocate of the Supreme Court shall be required to present any document empowering him to act. The Attorney-General may appoint a proctor to act specially in any particular case or to act generally on behalf of the Crown.

This section is substantially the same as section 39 of the Indian Code.

Where a proxy authorised the proctor to sue on a promissory note, but the plaint, when filed, also contained a money count for the consideration of the note, *held*, that the proxy was a sufficient authority to introduce the money count into the plaint [*Muttiah v. Perumal*, 2 C. L. R. 180].

The responsibility of a proxy being properly executed rests with the proctor [see *Maharajah of Burdwan*, petitioner, 7 W. R. 475].

No fresh proxy is necessary to appear in any proceedings subsequent to decree even in such as an appeal to the Privy Council [see *Shah Makhun v. Sreekishen Singh*, 8 W. R. 92], or for execution of decree, or to answer a claim to property seized in execution [see *Gopal Jaya Chand v. Hargovind*, 5 Bom 83].

In India, subject to the rules of the High Court, an advocate may perform all the duties of a pleader without producing a *vukalatnamah* (proxy) [*Bakhtawar v. Sant Lal*, I. L. R. 9, Alla. 617].

28 If any such proctor as in the last preceding section is mentioned shall die, or be removed or suspended, or otherwise become incapable to act as aforesaid, at any time before judgment, no further

Death or
incapacity of
proctor.

proceeding shall be taken in the action against the party for whom he appeared until thirty days after notice to appoint another proctor has been given to that party either personally or in such other manner as the court directs.

Service on
proctor.

29 Any process served on the proctor of any party or left at the office or ordinary residence of such proctor, relative to an action or appeal, except where the same is for the personal appearance of the party, shall be presumed to be duly communicated and made known to the party whom the proctor represents; and, unless the court otherwise directs, shall be as effectual, for all purposes in relation to the action or appeal as if the same had been given to, or served on, the party in person.

This section is the same as section 40 of the Indian Code.

The defendant in an action in summary procedure under chapter 53 was represented upon appearance to the summons by a proctor whose proxy authorised him generally to defend the action. The proctor took exception to the procedure, and, after appeal to the Supreme Court, the plaintiffs were directed to proceed by way of regular procedure. The proctor also applied to dissolve a sequestration of the defendant's property, and unsuccessfully appealed against the refusal of his application. The plaintiffs then issued summons by way of regular procedure, and service was effected on the proctor—*Held*, that such service was good under this section [*The Bank of Madras v. Ponnesamy*, 2 C. L. R. 26].

Service of notice of appeal upon respondent's pleader is good service on him [*Ishur Dutt v. Shib Pershad*, 15 W. R. 290]; and service on the attorneys on the record has been held in India to be good even after a decree *nisi* in a divorce suit [*King v. King*, 1. L. R. 6 Bom. 416].

Agent to
accept
service.

30 Besides the recognised agents described in section 25, any person residing within the jurisdiction of the court may be appointed an agent to accept service of process. Such appointment may be special or general, and shall be made by an instrument in writing signed by the principal, which shall contain an address at which such service may be made, and which, or, if

the appointment be general, a duly attested copy thereof, shall be filed in court.

This section is the same as section 41 of the Indian Code.

31 A warrant or power of attorney to confess judgment in any action may be given by any person to a proctor in the form No. 12 in the second schedule hereto, but no such warrant or power of attorney shall be of any force unless there is present at the execution thereof some proctor of the Supreme or district court on behalf of such person expressly named by him, and attending at his request to inform him of the nature and effect of such warrant or power before the same is executed, which proctor shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be proctor for the person executing the same, and state that he subscribes as such proctor. Every such proctor so subscribing shall state in such declaration that he read and explained the contents of such warrant or power to the person executing the same, and that such person appeared to understand the nature and effect thereof; and no such warrant or power not executed in manner aforesaid shall be rendered valid by proof that the person who executed the same did in fact understand the nature and effect thereof, or was fully informed of the same.

Warrant or power of attorney to confess judgment, requisites of.

32 Every such warrant or power to confess judgment, or a true copy thereof, shall be filed with the secretary of the district court having jurisdiction in the action within twenty-one days after the execution thereof. Every such warrant or power which, or a copy of which as aforesaid, shall not be so filed, shall be deemed fraudulent, and shall be void; and if any such warrant or power so filed was given subject to any defeasance or condition, such defeasance or condition shall be written on the same paper with the warrant

To be filed.

or power before the filing thereof, otherwise the warrant or power shall be void.

Chapter 6.

Of the Scope and Subject of Action.

Action, how
to be framed.

33 Every regular action shall, as far as practicable, be so framed as to afford ground for a final decision upon the subjects in dispute, and so to prevent further litigation concerning them.

This section is the same as section 42 of the Indian Code.

To include
whole claim.

34 Every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action : but a plaintiff may relinquish any portion of his claim in order to bring the action within the jurisdiction of any court.

If a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies : but if he omits (except with the leave of the court obtained before the hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.

For the purpose of this section, an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action.

Illustration.

A lets a house to B at a yearly rent of Rs. 1,000. The rent for the whole of the two years, 1886 and 1887, is due and unpaid. A sues B only for the rent due for one of those years. A shall not afterwards sue B for the rent due for the other year.

This section is the same as section 43 of the Indian Code.

"Except with the leave of the court obtained before the hearing."—In *Ramen Chetty v. Carpen* [1 S. C. R. 242] these words were construed to mean that if a plaintiff has omitted a part of his claim, he may, before that claim is heard, ask the leave of the court to sue for the omitted remedy ; and so, in that case, it was held that where a plaintiff had instituted two actions against the same defendant on the same promissory

note, one for interest and the other for the principal sum due on the note, and when the action for interest came on for hearing he abandoned it with leave of the court and elected to proceed on with the action for the principal sum only, this second action could be maintained under the exception contained in the words cited above.

Where in a case of property seized in execution part of the property was claimed by the plaintiff jointly with another, and part by the plaintiff only, and the claims, after due investigation, were disallowed, the institution of one action by the plaintiff and his joint owner in respect of the part of the property claimed by them, and another action by the plaintiff only in respect of the part claimed by him is not obnoxious to this section [*Fernando v. Veerawagu*, 1 C. L. R. 83].

A and B being joint-lessors, A sued the lessee for his half share of the rent on the lease for a certain period, making B a party defendant to the action and requiring him to show cause, if any, why judgment for half the rent should not go in favour of A. A recovered judgment. Subsequently both A and B sued the lessee for the other half share of the rent for the above period, and for the whole of the rent for a subsequent period, and for a cancellation of the lease.—*Held*, that the action was not barred by this section [*Buddharakita v. Gunasekera*, 1 N. L. R. 206].

Where a plaintiff sued for possession of immovable property upon a forfeiture, and for rent in respect of the said property up to the date of the alleged forfeiture, and having obtained a decree subsequently brought a separate suit for mesne profits including the period from the date of the forfeiture to the date of the institution of the former suit—*held*, that the claim for mesne profits for the period was barred by section 43 (corresponding to this section of our Code) of the Indian Code [*Mewa v. Banarsi*, I. L. R. 17, Alla. 533].

One test in deciding whether the cause of action in two suits is the same has been laid down to be whether the same evidence would support both [*Brunsdon v. Humphrey*, 14 Q. B. D. 141, p. 149. See *Soorasomderee v. Golam Ali*, 19 W. R. 141].

The principle on which this section is founded has been laid down to be that where the cause of action is the same and the plaintiff has had an opportunity in the former suit of recovering what he seeks to recover in the second, the former recovery is a bar to the later action [*Nelson v. Couch*, 15 C. B. (N. S.) 99], unless in the first action plaintiff had no opportunity of satisfying his claim [*Brunsdon v. Humphrey*, 14 Q. B. D. 141; *Serrao v. Noal*, 15 Q. B. D. 549, p. 556].

Where a case is decided on one view of a document, which view is acquiesced in by a party, he cannot succeed on a different construction subsequently [*Gandy v. Gandy*, 30 C. D. 57].

When on a date on which rents for several years are due on a lease the lessor sues for rent of one of those years only a second suit for rents of the other years is barred [*Tarruck Chander v. Panchu*, I. L. R. 6, Cal. 791; *Madan Mohan v. Lalla Sheosanker*, I. L. R. 12, Cal. 482]. As to suits on promissory notes payable by instalments, see *Macintosh v. Gill* [12 B. L. R. 37]. As to suits for mesne profits see *Rookminee v. Ram Tohul* [21 W. R. 223]. As to suits for damages for dispossession see *Seam v. Kamaluddy* [22 W. R. 424]. As to whether all claims arising under one contract should be joined in one suit see *Anderson v. Kalagarla* [I. L. R. 12, Cal. 339; *Sheo Shankur v. Hriday*, I. L. R. 9, Cal. 143] and *Shri Shalapa v. Bulapa* [I. L. R. 7, Bom. 446], where two successive suits for interest were brought after principal and interest became due. A suit for rent of one year at an enhanced rate will not bar a subsequent suit for the rent of the same year at the old rate [*Suddurraddin v. Bani Madhub*, I. L. R. 15, Cal. 145], as the cause of action is different.

A creditor of a deceased person sued some of the heirs of the latter to recover the debt and obtained a decree, which he partly satisfied by execution against the property of the deceased in the defendants' hands.—*Held*, that a second suit against the other heirs of the deceased for the balance of the debt was not barred [*Purum Sookh v. Surbhan*, 2 Agra 323].

A got a money decree on a mortgage bond against his mortgagor, and then sued a purchaser of part to enforce his lien. He afterwards brought a second suit against the purchaser of the remainder. It was held that he might have sued, but was not bound to sue both purchasers in one suit [*Huree Mohan v. Paramanick*, 15 W. R. 486. See *Ram Tewary v. Luckman Persad*, 8 W. R. 15; and as to the propriety of suing all such persons jointly see *Hiralall v. Prosunno*, 12 Cal. L. R. 556]. A suit on a mortgage bond against the mortgagor does not bar a subsequent suit to enforce the mortgage lien against the mortgagor and subsequent mortgagees who denied the plaintiff's right to priority over them [*Bungsee Singh v. Sudist Lal*, 10 Cal. L. R. 263].

A sued B to redeem a parcel of land which he alleged had been mortgaged to B. The suit was dismissed as the mortgage was not proved. A then sued for possession on title.—*Held*, the suit was not barred [*Naro Balvant v. Ramchandra*, I. L. R. 13, Bom. 326]. Nor does failure in a suit of simple ejectment affect a subsequent suit to enforce a mortgagor's right to redeem [*Shridhar Vinayak v. Narayan*, 11 Bom. 224, p. 230].

A suit for mesne profits does not bar a subsequent suit for possession [*Monohur Gouri Sunkur*, I. L. R. 9, Cal. 283; *Tirupati v. Narasinha*, I. L. R. 11, Mad. 210].

A second suit by the same plaintiff will not be barred unless the same cause of action be found within the four corners of the plaint in the first suit [*Jibunti Nath v. Shib Nath*, I. L. R. 8, Cal. 819, followed in *Komola Kaminey v. Loke Nath*, I. L. R. 8, Cal. 825, and in *Monoo v. Anand*, I. L. R. 12, Cal. 291]; and if the question is whether the second claim should have been included in the first, the pleadings and judgment of the first case can be referred to [*Jagarjit v. Sarabjit*, I. L. R. 19, Cal. 159]. In the above case of *Jibunti Nath v. Shib Nath* A sued B for a declaration of his title to certain property of which he alleged himself to be in possession. The suit was dismissed on the ground that he was not in possession at the time of filing the suit. A subsequent suit for possession was not held to be barred [I. L. R. 8, Cal. 819. See also *Ram Sewak v. Nakhed*, I. L. R. 4, Alla. 261; *Ambu v. Kettilamma*, I. L. R. 14, Mad. 23].

If it has been held in the first suit that the plaint discloses no cause of action, the second suit will not be barred [*Ram Soondur v. Krishno Chunder*, 17 W. R. 380].

"Omits to sue in respect of or intentionally relinquishes."—These words include accidental or involuntary omissions as well as acts of deliberate relinquishment [*Moonshe Buzloor Ruheem v. Shumsoonissa*, 11 Moore 551 at p. 605] of portions of one whole claim arising from one cause of action, i.e., the cause of action for which the suit is brought [*Pittapur Rajah v. Venkata*, L. R. 12 Ind. App. 116. See also *Bulcunt v. Chittan*, 3 Alla. 27]. This portion of the section assumes that the plaintiff was some time, prior to the suit, aware or informed of the claim, or aware of the facts which would give him a cause of action [*Venkata v. Krishnasami*, I. L. R. 6, Mad. 344]; for, a right which a litigant possesses without knowing or ever having known that he possesses it can hardly be regarded as a portion of his claim within the meaning of the section [see *Amanat Bibi v. Imdad Husani*, 15 Ind. App. 106; *Ambu v. Kettilamma*, I. L. R. 14, Mad. 23]. A plaintiff cannot reserve his right to sue again by asserting in his plaint that he intends bringing a second suit for the portion omitted [*Soonder Bebee v. Khilloo Mull*, 2 Alla. 90].

"A person entitled to more than one remedy in respect of the same cause of action," &c.—A suit for rent would bar a second suit to enforce a forfeiture for non-payment of the same rent [*Subbaraja v. Krishna*, I. L. R. 6, Mad. 159]; and a suit for specific performance of a contract will bar a subsequent suit for damages for failure to perform [*Shib Kristo v. Abdool Sobham*, 15 W. R. 405]. A mortgagee obtaining a money decree on a mortgage bond might execute his decree against the mortgaged property in the hands of the mortgagor by attachment and sale, and he might bring a subsequent suit to charge the property in the hands of a person who had purchased from the mortgagor

subsequently to the mortgage [see *Syud Emam Momtazooddeen v. Raj Coomar Dass*, 14 B. L. R. 408 ; *Narsidas v. Joglekar*, I. L. R. 4, Bom. 57]. As to the change of the law in India as to this matter by the Transfer of Property Act, IV. of 1882, see *Kaveri v. Ananthayya*, I. L. R. 10, Mad. 129. A suit for a declaration of right to enjoy separate possession of certain lands will not bar a subsequent suit for partition of those lands [*Andi v. Thatha*, I. L. R. 10, Mad. 347].

Joinder of
claims in
actions for
immovable
property.

35 (1) In an action for the recovery of immovable property, or to obtain a declaration of title to immovable property, no other claim, or any cause of action, shall be made unless with the leave of the court, except—

- (a) Claims in respect of mesne profits or arrears of rent in respect of the property claimed ;
- (b) Damages for breach of any contract under which the property or any part thereof is held ; or consequential on the trespass which constitutes the cause of action ; and
- (c) Claims by a mortgagee to enforce any of his remedies under the mortgage.

Example.—A sues B to recover land upon the allegation that the land belongs to C, and that he (A) has bought it of C. A makes C a party defendant ; but he cannot, without leave of the court, join with this claim an alternative claim for damages against C for non-performance of his contract of sale.

In actions
against
executors,
&c.

(2) No claim by or against an executor, administrator, or heir as such, shall in any action be joined with claims by or against him personally unless the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator, or heir, or are such as he was entitled to or liable for jointly with the deceased person whom he represents.

This section is the same as section 44 of the Indian Code. See O. 18, Rules 2, 5, under the Judicature Acts.

Where a plaintiff in his personal capacity and as administrator of the estate of his deceased wife sued defendant on a bond on

which plaintiff and his wife were obligees, and with that claim plaintiff joined a claim as administrator of his deceased wife for a gold ornament which belonged to his wife, and which was in the defendant's possession, *held*, that the joinder of these two claims in one action was not obnoxious to this sub-section. If plaintiff was suing for the gold ornament in his personal capacity he could not well join his claim for it with the other cause of action [*Wyremuttu v. Eliyatamby*, 2 N. L. R. 213].

An objection for mis-joinder of causes of action must be taken in the court of first instance [*Dhondiba v. Ramchandra*, I. L. R. 5, Bom. 554], and if the court instead of rejecting the plaint or returning it for amendment proceed to trial, it should not subsequently dismiss the suit for mis-joinder, but dispose of it on the merits [*Kishna Ram v. Rakmini*, I. L. R. 9, Alla. 221].

The first paragraph of this section refers to a suit formed upon an existing title in which the plaintiff asks for a declaration of such title or for possession [*Cutts v. Brown*, 7 Cal. L. R. 171 ; I. L. R. 6, Cal. 328]. It does not prevent joinder of several causes of action to recover immovable property, but only the joinder with such causes of action of certain other causes of action of a different character [*Chadambara v. Ramasami*, I. L. R. 5, Mad. 161]. Nor does it prevent a plaintiff suing for movable and immovable property if the cause of action is the same [*Giyana v. Kandasami*, I. L. R. 10, Mad. 375, p. 506 ; *Gadhill v. Hunter*, 14 C. D. 493].

A suit for recovery of a mortgage debt with an alternative prayer for sale of the mortgaged property is not a suit to recover immovable property [*Govinda v. Mana Vikraman*, I. L. R. 14, Mad. 284].

A suit for specific performance of an agreement to sell a share of a house may be joined with a suit to recover a sum of money due from a defendant on promissory notes [*Cutts v. Brown*, 7 Cal. L. R. 171 ; I. L. R. 6, Cal. 328].

"Unless with the leave of the court," &c.—Application for leave should be made before the plaint is filed [*Pilcher v. Hinds*, 11 C. D. 492], though possibly on good cause shown leave may be given afterwards [*Musgrave v. Stevens*, W. N. 1881, p. 163 ; *Clark v. Wray*, L. R. 31 C. D. 68].

Leave will be given to join whenever it is sought to recover immovable and movable property comprised in the same instrument [*Cook v. Enchmarch*, 2 C. D. 111] ; and claims for the administration of personal estate and to establish a title to real estate have been joined where both estates rested on a common gift in the same will [*Whetstone v. Devis*, 1. C. D. 99].

The law does not compel a plaintiff to get leave to join distinct causes of action [*Sheo Ratan v. Sheosahai*, I. L. R. 6, Alla. 358 ; *Becharji v. Pujaji*, I. L. R. 15, Bom. 31, p. 53].

Sub-section (2).—In suing an executor or administrator it frequently becomes a question whether he should be sued as legal representative or personally [see *Ashby v. Ashby*, 7 B. & C. 444; *Farhall v. Farhall*, L. R. 7 Ch. 123], and then it becomes a question whether the contracts being personally entered into by him, he should be sued in his character of legal personal representative or in his personal character, being left afterwards to get payment, if he could, out of the assets, in the course of administration. The object of this sub-section in the Indian Code has been stated to be to get over such difficulties.

“Heir as such.”—This means that the plaintiff rests his claim entirely on the allegation that he is the heir of another, and as such asserts a right against the defendant [*Ashabai v. Haji Tyeb*, I. L. R. 6, Bom. 390].

In other cases.

36 Subject to the rules contained in the last section, the plaintiff may unite in the same action several causes of action against the same defendant or the same defendants jointly, and any plaintiffs having causes of action in which they are jointly interested against the same defendant or defendants may unite such causes of action in the same action.

Exception :
court may
order
separation.

But if it appears to the court that any such causes of action cannot be conveniently tried or disposed of together, the court may, at any time before the hearing, of its own motion or on the application of any defendant, in both cases either in the presence of, or upon notice to, the plaintiff, or at any subsequent stage of the action if the parties agree, order separate trials of any such causes of action to be had, or make such other order as may be necessary or expedient for the separate disposal thereof.

When causes of action are united, the jurisdiction of the court as regards the action shall depend on the amount or value of the aggregate subject-matters at the date of instituting the action, whether or not an order has been made under the second paragraph of this section.

This section is the same as section 45 of the Indian Code, with the addition of the words “in both cases either in the presence of, or upon notice to the plaintiff.”

(See O. 18, R. 1, under the Judicature Acts.)

This section applies to cases where there are only one plaintiff, one defendant, and several causes of action, and to cases where the plaintiffs (or defendants), though consisting of two or more individuals, may be considered as a unit with reference to all the different causes of action [see *Narsing Das v. Mangal Dubey*, I. L. R. 5, Alla. 163 ; *Bhagwati v. Bindeshri*, I. L. R. 6, Alla. 106].

Where a landlord sued four tenants holding three distinct tenures to enhance the rent of each tenure, *held*, that separate trials should have been ordered [*Juggut Chander v. Ear Mahomed*, 24 W. R. 217].

Where all the plaintiffs have a common interest in the whole of the matter comprised in a suit, the objection of multifariousness set up by the defendants who are concerned only in a portion of the subject-matter is a question of discretion, to be determined upon considerations of convenience with regard to the circumstances of each particular case [see *Coates v. Legard*, L. R. 19, E. 56 ; *Campbell v. Mackay*, 1 My. & Cr. 603]. The question is whether the various subjects as to which relief is sought are such as, if fit for discussion, can be properly dealt with in one suit [*Pointon v. Pointon*, L. R. 12, Eq. 547].

Where A obtained a decree against B for the possession of certain lands in which eighty-six persons had distinct and separate tenures, and these eighty-six persons, in consequence of a combination entered into by them, had joined in keeping A out of possession of the lands, it was held that A might join the eighty-six tenants as defendants in one suit [*Loke Nath v. Keshab Ram*, I. L. R. 13, Cal. 147. But see *Hurro v. Onookool*, 8 W. R. 461.]

Where distinct portions of a mortgaged property are sold by the mortgagor to different persons on various dates subsequent to the mortgage, the mortgagee might [by the analogy of the ruling in *Bal Kishen v. Bistoo Churn*, 22 W. R. 532, and *Srinath Das v. Khetter Mohun*, I. L. R. 16, Cal. 693] sue his mortgagor and the purchasers in one suit.

A suit may be brought against the plaintiff's guardian and persons to whom the guardian sold the plaintiff's property during his minority [*Sami v. Ammani*, 7 Mad. 260 ; *Mahomed v. Krishnan*, I. L. R. 11, Mad. 106].

A suit by a person holding a decree for possession of certain lands against the defendant in the former suit and against other persons in possession who claimed title to distinct portions of the land, there being no combination or collusion between the defendants to keep the plaintiff out of possession, is multifarious [*Ram Narani v. Amoda Prosad*, I. L. R. 14, Cal. 681] ; and the same rule applies if an auction-purchaser sues several persons holding under different titles [*Sudhendu v. Durga*, I. L. R. 14, Cal. 435]. A suit for possession of lands against a number of

defendants who claiming distinct interests dispossessed the plaintiff from distinct portions of the lands on different dates is also bad for multifariousness [*Ranee Surut v. Soorjoo Kant*, 11 W. R. 397] ; and so is a suit against two defendants for the price of timber separately purchased by them from the plaintiff [*Baroo v. Massim*, 21 W. R. 206]. The principles on which these cases were decided are laid down in *Raja Ram v. Luchmun*, 8 W. R. 15 ; and *Baboo Motee v. Ranees*, 8 W. R. 64.

In these cases an issue of mis-joinder may be raised with other issues, evidence taken and the case dismissed for mis-joinder without recording a finding on the other issues [*Inrit Nath v. Roy Dunput*, 9 B. L. R. 241], or the plaintiff may be called on to elect against which defendant he will proceed [*Hurro Monee v. Onoakool*, 8 W. R. 461].

Application
by defendant
in such cases.

37 Any defendant alleging that the plaintiff has united in the same action several causes of action which cannot be conveniently disposed of in one action, may at any time before the hearing apply to the court for an order confining the action to such of the causes of action as may be conveniently disposed of in one action.

This section is the same as section 46 of the Indian Code, except that under the Indian Code the application may be made even after the issues are settled, but before any evidence is recorded. See O. 18, R. 8, under the Judicature Acts.

This section only applies where there are several cause of action against the same defendant. It does not justify a Judge striking out a party [*Khadar v. Chotibibi*, I. L. R. 8, Bom. 616].

Order of
court thereon.

38 If, on the hearing of such application, it appears to the court that the causes of action are such as cannot all be conveniently disposed of in one action, the court may order any of such causes of action to be excluded, and may direct the plaint to be amended accordingly, and may make such order as to costs as may be just.

Every amendment made under this section shall be attested by the signature of the judge.

The same as section 47 of the Indian Code. See O. 18, R. 9, under the Judicature Acts.

Chapter 7.

Action to
commence by
plaint.

Of the Mode of Institution of Action.

39 Every action of regular procedure shall be instituted by presenting a duly stamped written plaint

to the court or to such officer as the court shall appoint in this behalf ; or, in the court of requests, the plaintiff may personally state his case *vivâ voce* in open court to the commissioner, who shall reduce the same into writing upon a stamp being supplied by the plaintiff, such as would be required for a written plaint in respect of the same cause of action, and the said stamp shall be affixed to the writing so made of the said statement, and the statement so taken down in writing and-stamped shall in such case be the plaint.

The corresponding section in the Indian Code is section 48, but the provision of that section is simply that "every suit shall be instituted by presenting a plaint to the court or such officer as it appoints in this behalf."

Where a plaint is insufficiently stamped the proper course for the defendant is at once to take steps to have it taken off the file, and not to wait until the trial and then take exception to the sufficiency of the pleading [*Fernando v. Fernando*, 2 C. L. R. 35].

Where a plaint is rejected, and a fresh plaint has to be filed, the institution of the action must be dated the day on which the new plaint is presented [*Endoris v. Hamine*, 3 N. L. R. 97].

For the purposes of limitation a suit must be considered to have commenced from the date on which the plaint was originally presented, and not from the date of its amendment [*Patel v. Bai*, I. L. R. 19, Bom. 320].

40 The plaint shall be distinctly written in the English language upon good and suitable paper, and shall contain the following particulars :

Requisites
of plaints.

- (a) The name of the court and date of filing the plaint ;
- (b) The name, description, and place of residence of the plaintiff ;
- (c) The name, description, and place of residence of the defendant so far as the same can be ascertained ;
- (d) A plain and concise statement of the circumstances constituting each cause of action, and where and when it arose. Such statement shall be set forth in duly numbered

paragraphs ; and where two or more causes of action are set out, the statement of the circumstances constituting each cause of action must be separate, and numbered ;

(e) A demand of the relief which the plaintiff claims ; and

(f) If the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished.

If the plaintiff seeks the recovery of money, the plaint must state the precise amount, so far as the case admits. In an action for a specific chattel, or to establish, recover, or enforce any right, status, or privilege, or for mesne profits, or for the amount which will be found due to the plaintiff on taking unsettled accounts between him and the defendant, the plaint need only state approximately the value of the chattel, right, status, or privilege, or the amount sued for.

This section and sections 41, 42, 43, and 44 of our Code are an adaptation with certain necessary variations of section 50 of the Indian Code. See O. 19, R. 2, under the Judicature Acts.

The Indian authorities under this section embrace sections 41 to 44 as well.

“Statement of the circumstances constituting each cause of action.”—Where in an action for the recovery of land the defendant is sued on the strength of the plaintiff's title, the plaint must contain averments disclosing the steps of this title so that the defendant may know what case he has to meet. In the absence of such averments a list annexed to the plaint of documents upon which the plaintiff relies is meaningless [*Kanapadian v. Pietersz*, 9 S. C. C. 185 ; 1 C. L. R. 75]. Where, however, the plaintiff has a present fee simple absolute in the premises claimed, it is sufficient to state that fact in the plaint, and it is not necessary to plead all the steps in the title. If the plaint alleges that the estate once in another has now vested in the plaintiff, it must state the name of that other and the date and nature of the conveyance. If the plaintiff has only a particular estate as distinct from one in fee simple, or if in the case of an estate in fee simple it is not yet in possession, the steps in the title must be indicated, and the nature of the instruments passing it must be stated [*Abubaker v. Perera*, 2 C. L. R. 170].

A plaintiff in a partition suit ought not only to state the extent of his claim, but must disclose facts which warrant his claim to the extent of his share [*Deparis v. Christian*, 1 S. C. R. 211].

When a person sues on behalf of his principal under a power of attorney, the principal's name should appear as plaintiff [*Choonee Sookul v. Hur Pershad*, 1 Alla. 277].

The plaintiff must include all the existing grounds on which the plaintiff can succeed [*Premanund v. Ram Churn*, 20 W. R. 482; *Denobundhoo v. Kristomonee*, I. L. R. 2, Cal. 152]. It must not contain mere argument [*Bishen Sahaye v. Beer Kishore*, 8 W. R. 296]. The different titles should be set out in the alternative, otherwise the title which has been put forward will alone be put in issue, and if the plaintiff is not successful a second suit will be barred [*Kalidum v. Shiba Nath*, I. L. R. 8, Cal. 483, p. 501. But see *Becharji v. Pujaji*, I. L. R. 14, Bom. 31].

Alternative titles may be pleaded. A person may base his suit on a mortgage and a deed of sale [*Ramguttay v. Abdool*, 20 W. R. 73]; or base a claim to land on a hereditary right and also a right of occupancy [*Woodit v. Buldeo*, 21 W. R. 12]; but a claim to property as the property of the plaintiff is inconsistent with his claiming it by prescription, and in such a case the court should call on him to elect [*Bijoy Keshub v. Obhoy Churn*, 16 W. R. 198. But see *Ameeroonissa v. Woomaroodden*, 14 W. R. 49]. A plaintiff cannot make inconsistent statements of facts though he may plead inconsistent titles [see *In re Morgan*, 39 C. D. 492; *Philipps v. Philipps*, 4 Q. B. D. 127, p. 134].

A claim in the plaint to set aside a document as a forgery cannot be combined with a subsequent claim to set it aside on the ground that no consideration passed, or undue influence or fraud had been practised on the executant [*Mahomed v. Hosseini*, 15 Ind. App. 86; *Iyappa v. Ramalakshamma*, I. L. R. 13, Mad. 550].

In a suit for a declaration of title, the title and the circumstances requiring the declaration should be set forth [*Khadim Ali v. Nazeer Begum*, 3 Alla. 262].

An averment of fraud cannot be sustained by mere general allegations [*Walingford v. The Mutual Society*, 5 App. Cas. 697; the particulars must be set out, *Gunga Narani v. Tiluckram*, 15 Ind. App. 119]. The use of such general words as "fraud" and "collusion" are ineffectual to give a fraudulent colour to the particular statement of fact in the plaint, unless these statements taken by themselves are such as to imply that fraud has been actually committed [*Gunga Narani v. Tiluckram*, 15 Ind. App. 119]. Thus, a plaint to set aside an award must definitely state some fraud or other malpractice of the opposite party [*Hurchurun Doss v. Hazam Mull*, 1 Ind. Jur. O. S. 12].

Where a plaint discloses no cause of action, a Court is justified in examining the pleaders on both sides, and from their examination eliciting and fixing the real issue and determining the case on the trial of such issue [*Man Gobind v. Umbika Monee*, 16 W. R. 218].

Objections for want of sufficient description of parties must be taken at the earliest opportunity and before the first hearing [*Rajnarani v. Universal Life Assurance Co.*, I. L. R. 7, Cal. 594, p. 602].

The second paragraph of clause (f) of this section does not apply to the case where a plaintiff asks for mesne profits from date of suit to date of restoration of possession, in a suit for possession of land [*Ram Krishna v. Bhimabai*, I. L. R. 15, Bom. 416].

Land sued for to be described by metes and bounds or sketch.

41 When the claim made in the action is for some specific portion of land, or for some share or interest in a specific portion of land, then the portion of land must be described in the plaint so far as possible by reference to physical metes and bounds, or by reference to a sufficient sketch, map, or plan to be appended to the plaint, and not by name only.

Plaintiff suing in a representative character must show that the character has accrued to him.

42 When the plaintiff sues in a representative character, the plaint should show, not only that he has an actual existing interest in the subject-matter, but that he has taken the steps necessary to enable him to institute an action concerning it.

Illustrations.

(a) A sues as B's executor. The plaint must state that A has proved B's will.

(b) A sues as C's administrator. The plaint must state that A has taken out administration to C's estate.

See section 50 of the Indian Code and notes under section 40 *ante*.

Plaint must show defendant's interest and liability to be sued.

43 The plaint must show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand.

See section 50 of the Indian Code and notes under section 40 *ante*.

44 If the cause of action arose beyond the period ordinarily allowed by any law for instituting the action, the plaintiff must show the ground upon which exemption from such law is claimed.

Exemption from bar from lapse of time to be shown.

See section 50 of the Indian Code and notes under section 40 *ante*.

45 Every plaint shall contain a statement of facts setting out the jurisdiction of the court to try and determine the claim in respect of which the action is brought.

Jurisdiction of court to be averred.

46 Every plaint presented by a proctor on behalf of a plaintiff shall be subscribed by such proctor. In every other case in which a plaint is presented, it shall be subscribed by the plaintiff: and his signature shall be verified by the signature of some officer authorised by the court in that behalf.

Subscription of plaint.

Before the plaint (whether presented by the plaintiff or by a proctor in his behalf) is allowed to be filed, the court may, if in its discretion it shall think fit, refuse to entertain the same for any of the following reasons, viz.:

Court may refuse to entertain plaint.

(a) If it does not state correctly, and without prolixity, the several particulars hereinbefore required to be specified therein;

(b) If it contains any particulars other than those so required;

(c) If it is not subscribed, or subscribed and verified, as the case may be, as hereinbefore required;

(d) If it does not disclose a cause of action;

(e) If it is not framed in accordance with section 33;

(f) If it is wrongly framed by reason of non-joinder or mis-joinder of parties, or because the plaintiff has joined causes of action which ought not to be joined in the same action;

and may return the same for amendment then and there, or within such time as may be fixed by the

And may
reject.

court, upon such terms as to the payment of costs occasioned by the amendment, as the court thinks fit. Provided that no amendment shall be allowed which would have the effect of converting an action of one character into an action of another and inconsistent character : And provided, further, that in each of the following cases, viz. :

- (g) Where the relief sought is under-valued, and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so ;
- (h) Where the relief sought is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff on being required by the court to supply the requisite stamps within a time to be fixed by the court fails to do so ;
- (i) When the action appears from the statement in the plaint to be barred by any positive rule of law ;
- (j) When the plaint having been returned for amendment within a time fixed by the court is not amended within such time—

the plaint shall be rejected ; but such rejection shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

See sections 53 and 54 of the Indian Code and O. 19, R. 2, under the Judicature Acts.

A plaint once accepted and filed cannot be taken off the file without notice to the plaintiff [*Fernando v. Waas*, 9 S. C. C. 189].

The effect of sub-section (i) is that the statutory bars provided by the Legislature, which formerly were matters of which a defendant might or might not take advantage at his discretion, and which consequently he had himself expressly to set up in defence, are now converted into absolute bars which every plaintiff has to meet. Where, therefore, the existence of such a bar is not disclosed in the pleadings, but becomes apparent at a subsequent stage of the case, the Judge may, *ex mero motu suo*.

recognise it, and, unless the plaintiff be in a position to avoid it, may dismiss the action [*Arunasalem v. Ramanathan*, 9 S. C. C. 190].

When a plaint, defective in some material respect, has been filed, it is not necessary to move that it be taken off the file, but it is the duty of the court, of its own accord, or upon its attention being called, to reject the plaint or return it to the plaintiff for amendment. If the plaint is good *ex facie*, any objection thereto must be taken by the answer [*Read v. Samsudin*, 1 N. L. R. 292].

When a plaint is returned for amendment, the Judge must make an order specifying the date when the plaint was presented, the name of the person by whom it was presented, whether such person was the plaintiff in person or a proctor, and the fault or defect constituting the ground of return, and every such endorsement must be signed by the Judge and filed of record [*Endoris v. Hamine*, 3 N. L. R. 97].

The object of a plaint is said to be to bring the matter in dispute between the parties before the court, but upon settlement of issues the Judge is to ascertain what is the real question to be tried, and at the hearing, if he can, either upon the issues already framed or upon amended issues, determine that question, he ought to do so. Where in a plaint it was stated that the defendant entered into a contract with the plaintiff for the purchase of seed, but on examination of the plaintiff it appeared that no such contract was entered into, but that the plaintiff agreed to buy for the defendant as his agent, it was held that the suit should not have been dismissed, but that it should have been tried on the merits [*Arbuthnot v. Betts*, 6 B. L. R. 373 ; 14 W. R. 181].

Where the amount to which the plaintiff would be entitled on the evidence exceeds that specified in the plaint, plaintiff is restricted to the amount so specified [*Nathooram v. Jardine, Skinner & Co.*, 1 Coryton, 118. See also 2 Moore, 113, except the case of mesne profits].

In considering whether a plaint should be admitted or rejected as showing no cause of action, reference should not be made to documents or facts not stated in or annexed to it, nor should the plaintiff be interrogated, but the court should confine itself to the plaint [*Girdharlal v. Jagannath*, 10 Bom. 182].

A plaint should be rejected, not returned, if it does not disclose a cause of action [*Nagar Mal v. Macpherson*, I. L. R. 3, Alla. 766] ; but an Appellate Court should not reverse a decree solely on this ground without being satisfied that no such cause of action was established by the evidence [*Shah Ahmed v. Taree Rai*, I. L. R. 7, Cal. 343].

A plaint might also be rejected if intentionally obscure [*Mahomed v. Potun*, 20 W. R. 147]; or if it joined causes of action against several defendants which accrued separately [*Ram Tewary v. Luchmun*, 8 W. R. 15; 1 B. L. R. (F. B.) 731].

Where the subject-matter alleged raises a fair question for trial, the plaint should not be rejected on the ground that the plaintiff is not likely to succeed [*Lakshmi Ammal v. Tikareem*, 1 Mad. 240].

Where a plaint does not disclose a cause of action, the proper order to be passed in appeal is to reject it, and not to dismiss the action [*Gunga Narayan v. Tiluckram*, 15 Ind. App. 119].

Where a plaint is returned for amendment, the order should specify a certain time within which such amendment should be made [*Sheo Partab v. Sheo Gholam*, I. L. R. 2, Alla. 875; *Ismail v. Chetti*, 1 Mad. 427]; and the date of first presentation, and not the date of carrying out the order, is the date up to which limitation should be counted [*Sheo Partab v. Sheo Gholam*, I. L. R. 2, Alla. 875; *Khem Karan v. Har Dayal*, I. L. R. 4, Alla. 37; *Ram Lal v. Harrison*, I. L. R. 2, Alla. 832].

Where a plaintiff, after institution of action, discovered that the defendant was a minor, and thereafter obtained an order to appoint a guardian and amend his plaint, held that the suit was legally instituted at the date of first presentation of plaint [*Khem Karan v. Har Dayal*, I. L. R. 4, Alla. 37].

Amendments must be either involved in the pleadings or consistent with the case as originally laid, and the state of facts and the equities and ground of relief originally alleged and pleaded should not be departed from [*Eshenchunder v. Shamo Churn*, 11 Moore, 7; *Mukhoda Soondury v. Ram Churn*, I. L. R. 8, Cal. 871; *Hari v. Shapurji*, I. L. R. 10, Bom. 461].

A charge of fraud must be substantially proved as laid, and when one kind of fraud has been charged another kind of fraud cannot be substituted for it [*Abdul Hossein v. Turner*, L. R. 14, Ind. App. 111; *Kunhammed v. Kutti*, I. L. R. 14, Mad. 167].

As a general rule a plaintiff must abide by his plaint, and he cannot, after the parties have come to trial, abandon his own story, and adopt that of the defendant and ask relief thereon [*Shibkristo v. Abdool*, I. L. R. 5, Cal. 602; *Ramchandra v. Vasudev*, I. L. R. 10, Bom. 451].

Amendment should not be allowed save when the plaintiff has an honest case, and by some mistake or misapprehension has failed to put things properly before the court [*Bhyro v. Lekhranee*, 16 W. R. 123; *Mukhoda v. Ram Churn*, I. L. R. 8, Cal. 871]; nor if it will affect the rights of third parties [*Rughoonundun v. Gopal Chand*, 20 W. R. 17]; nor allowed so that totally new causes of action are added [*Narayan v. Hari*, I. L. R. 13, Bom. 664]. In the same way a defendant will not

be allowed to amend if the new defence places the plaintiff in a different position from that in which he would have been if the defendant had pleaded properly at first [*Steward v. North Met. Tram. Co.*, 16 Q. B. D. 556].

A suit for specific performance cannot be changed into one to cancel the contract and retain deposit even if the defendant says he is unwilling to complete [*Stone v. Smith*, 35 C. D. 188]; otherwise, if plaintiff had pleaded in the alternative [*Kingdon v. Kirk*, 37 C. D. 141].

Generally, if the specified right and infraction of it are not altered, the court is not wrong in giving a relief less than that claimed [*Pulamada v. Rawuther*, I. L. R. 11, Mad. 94]; but it cannot give relief of a different kind [*Ramchandra v. Vasudev*, I. L. R. 10, Bom. 451]; or change the suit so that the question in it is irrelevant to the relief claimed [*Ram Singh v. Depy. Commr. of Bara Banki*, 17 Ind. App. 54; I. L. R. 17, Cal. 444].

"Paper insufficiently stamped."—Does this cover a case where there is no stamp at all on the document? [See *Bishnath v. Jagarnath*, I. L. R. 13, Alla. 305.]

A plaint should not be rejected because costs in respect of a former suit have not been paid [*Luckeymonee v. Khetter*, 2 Ind. Jur. N. S. 117]; nor because the document on which plaintiff sues has not been filed with it [*Rayachand v. Rayachand*, 2 Bom. 369.]

Where a plaint improperly stamped is given back to have a proper stamp affixed, the date of the suit is the date on which it was filed [*Bejee v. Yusuf*, 6 Alla. 139]; and the plaint cannot be rejected without giving the plaintiff an opportunity of affixing the stamps [*Bai v. Mulchand*, I. L. R. 9, Bom. 355. But see *Balkaran v. Gobind Nath*, I. L. R. 12, Alla. 129]. The court can extend the period even after the time originally fixed has expired [*Bhugrandas v. Haji Abu*, I. L. R. 16, Bom. 263].

When a plaint is returned in order that it may be presented in the proper court, no additional court fees are payable [*Prabhakarbhav v. Vishwambhar*, I. L. R. 8, Bom. 313].

The court has jurisdiction to reject a plaint after it is numbered and registered [*Venkatesa v. Ramasami*, I. L. R. 18, Mad. 338].

Pleadings and other documents in suits for partition under Ordinance No. 10 of 1863 need not be stamped [see Ordinance No. 10 of 1897]. Processes in partition suits, however, do not come within the scope of this exemption [*Perera v. Julihamy*, 1 Tamb. 25].

47 In every case where an action has been instituted in a court not having jurisdiction by reason of the amount or value involved, or by reason of the

Where plaint presented to wrong court.

conditions made necessary to the institution of an action in any particular court by section 9 not being present, the plaint shall be returned to be presented to the proper court.

Order on
rejection.

48 Every order returning or rejecting a plaint shall specify the date when the plaint was presented and so returned or rejected, the name of the person by whom it was presented, and whether such person was plaintiff or proctor, and the fault or defect constituting the ground of return or rejection; and every such order shall be in writing, signed by the judge, and filed of record.

These two sections are taken substantially from section 57 of the Indian Code.

Where a plaint is returned under section 47, the date of action is to be taken as that on which the plaint was originally filed [*Khellat Chunder v. Nusseebunnissa*, 16 W. R. 47].

Memorandum
of documents
to be endorsed
on plaint.

49 The plaintiff shall endorse on the plaint, or annex thereto, a memorandum of the documents (if any) which he has produced along with it; and if the plaint is admitted, shall present as many copies on unstamped paper of the plaint as there are defendants, each, in the case of Sinhalese, Tamil, or Moor defendants, translated into the language of the defendant for whom it is destined: unless the court, by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief or remedy required in the action, in which case he shall present such statements.

If the plaintiff sues or the defendant or any of the defendants is sued in a representative capacity, such statement shall show in what capacity such plaintiff or defendant sues or is sued; and the plaintiff may by leave of the court amend such statements so as to make them correspond with the plaint; such memorandum

and copies or statements shall be examined by the secretary, or clerk of the court, as the case may be, and signed by him if he finds them correct.

This section is largely taken from section 58 of the Indian Code.

A plaintiff should enter in his plaint and concise statement a claim for an injunction and receiver where the obtaining either is a substantial portion of the action [*Coleborne v. Coleborne*, 1 C. D. 690].

50 If a plaintiff sues upon a document in his possession or power, he shall produce it in court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint.

Plaintiff to produce with plaint document sued on.

This section is the first paragraph of section 59 of the Indian Code.

When a document produced with a plaint is insufficiently stamped, the document must be rejected on its being objected to by the defendant, or the insufficiency of the stamp being brought to the notice of the court by its proper officer [*Watson v. Alagan*, 1 S. C. R. 231].

51 If he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint.

To annex list of other documents.

This section is the second paragraph of section 59 of the Indian Code.

A defendant who claims a judgment in reconvention must comply with the requirements of this and the preceding section with regard to the documents on which he relies [*Punchirala v. Punchirala*, 2 C. L. R. 84].

The list under this section must succinctly state the names of the parties to, dates and nature of, the instruments and other particulars sufficient to enable the defendant to understand what is intended to be proved and to make necessary inquiries relating to them. There must also be shown a clear connection of the documents with the plaintiff and the subject-matter of the action. Otherwise the documents referred to are not admissible in evidence [*Abubaker v. Perera*, 2 C. L. R. 170].

Where in an action in the Court of Requests the defendant's objection to a copy of certain rules being put in evidence by the

plaintiff, was that it had not been included in a list of documents relied on under this section, and it appeared that the rules were referred to in the plaintiff's statement of claim and were evidently relied on, and there was no question as to the genuineness of the rules—*held*, that the objection was a purely technical one, and the defendant was liable to be deprived of his costs in the court below for insisting on it [*Read v. Samsudin*, 1 N. L. R. 292].

This and the preceding section only apply to such documents as are in their nature the essence of the case, and on which the plaint is founded [*Kameenee Dossee v. Hurromoney Dossee*, Coryton, 151].

And to
state where
document
not in his
possession is.

52 In the case of any such document not being in his possession or power, he shall, if possible, state in whose possession or power it is.

This section is the same as section 60 of the Indian Code.

Action on lost
negotiable
instrument.

53 In the case of any action founded upon a bill of exchange, promissory note, cheque, or any negotiable instrument, if it be proved that the instrument is lost, and if an indemnity be given by the plaintiff, to the satisfaction of the court, against the claims of any other person upon such instrument, the court may make such decree as it would have made if the plaintiff had produced the instrument in court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint.

This section is the same as section 61 of the Indian Code.

Document
not produced
with plaint
inadmissible
afterwards
without leave.

54 A document which ought to be produced in court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the court, be received in evidence on his behalf at the hearing of the action.

Nothing in this section applies to documents produced for cross-examination of the defendant's witnesses, or in answer to any case set up by the

defendant, or handed to a witness merely to refresh his memory.

This section is the same as section 63 of the Indian Code.

Where in an action to be declared entitled to certain land the plaintiff omitted to enter his title deed in a list of documents annexed to the plaint, but filed it with his plaint, *held*, that the defendant was in no way prejudiced by the omission, and that the District Judge should have exercised the discretion given to him by this section in the plaintiff's favour, and admitted the deed in evidence [*Allis v. Babunhamy*, 2 N. L. R. 198].

The omission to produce a document when instituting a suit is no ground for rejecting the plaint [*Ex parte Rayachund*, 2 Bom. 369].

If the plaintiff was in ignorance of the existence of a document when the plaint was filed, it may be admitted under this section [*Ritchie, Stuart & Co. v. Gladstone, Wyllie & Co.*, 1 Ind. Jur. O. S. 125]; or if the court is satisfied of its *bonâ fide* nature and reliableness [*Attaoollah Mundle v. Sukecooddeen Tarafdar*, W. R. 1864, p. 271]. If there is doubt of the existence of the document at the date of suit, it should be admitted [*Devidas v. Pirjada*, I. L. R. 8, Bom. 377].

Of the Issue and Service of Summons.

Chapter 8.

Issue.

55 Upon the plaint being filed and the copies or Summons. concise statements required by section 49 presented, the court shall order a summons in the form No. 16 in the second schedule hereto to issue, signed by the secretary or clerk of the court, requiring the defendant to appear and to answer the plaint on a day to be specified in the summons, and to be fixed with reasonable regard to the distance of the defendant's usual place of abode from the court-house and the current business of the court. The summons, together with such copy or concise statement, each translated into the language of the defendant, attached thereto, shall be delivered under a precept from the court in the form No. 17 in the said schedule, or to the like effect, to the fiscal of the district in which the defendant resides, who shall cause the same to be duly served on the defendant, or on each defendant if more than one, and

shall, as hereinafter provided, return the same and the execution thereof to the court, duly verified by the officer to whom the actual service thereof has been entrusted.

See sections 64 and 65 of the Indian Code.

"The summons together with such copy."—The "copy" referred to here is the copy of the plaint. The service of a summons on a Tamil defendant by delivering to him a translation of the summons into the Tamil language is a good service. It is not necessary that, in addition, a copy of the summons in English should be served [*Marku v. Dalukathu*, 9 S. C. C. 119].

Where summons has not been duly served in accordance with the provisions of this section the defendant is not bound to appear, and no judgment by default can be entered against him. If he appears, he cures the irregularity [*Senanayake v. Appu*, 2 S. C. R. 135].

The issue of summons unauthorised by the judge's signature and entry of date is irregular [*ibid*].

A summons once issued and returned unserved by reason that the defendant was not to be found does not require, when re-issued, to be stamped anew with the duty imposed either by Part II. or IV. of the Schedule to "The Stamp Ordinance, 1890" [*Singho Appu v. Mendis*, 2 C. L. R. 41].

An application for fresh summons to appear should not be made until the first summons has been returned into court [*Dowlut v. Onrao*, 14 W. R. 336]. It should be supported by a petition showing that a fruitless endeavour has been made on the part of the plaintiff to serve the first summons, and that it was not by any default of his that he had failed [*Urquhart v. Gilbert*, 1 Ind. Jur. N. S. 224].

If the defendant voluntarily appears there seems no reason to issue a summons [*Bank of Bengal v. Currie & Co.*, 3 B. L. R. 396, p. 403].

Court may
order
defendant to
appear in
person ; or

56 If the court sees reason to require the personal appearance of the defendant, the summons shall order him to appear in person in court on the day therein specified.

This section is the first paragraph of section 66 of the Indian Code.

As to result of non-appearance see section 84.

A person failing to appear in person in obedience to a personal summons may have the case decided *ex parte* against him, notwithstanding his pleader be present [*Baboo Monee Paul v.*

Baboo Gopal Singh, S. D., N. W. 1863, p. 37 : *Kistodhone Dutt v. Rajah Nilmoney Singh*, Coryton 3].

57 If the court sees reason to require the personal plaintiff appearance of the plaintiff on the same day, it may make an order for such appearance.

This is the second paragraph of section 66 of the Indian Code.

As to the result of non-appearance see section 84.

58 The summons to appear and answer shall order the defendant to produce any document in his possession or power, containing evidence relating to the merits of the plaintiff's case, or upon which the defendant intends to rely in support of his case.

Summons to order production of documents required by plaintiff or relied on by defendant.

This section is the same as section 70 of the Indian Code.

Service.

59 Subject to the several provisions as to service hereinafter in chapter XXIII. contained, service of the summons shall be made by delivering or tendering to the defendant personally a duplicate thereof.

Personal service of summons, what is.

See section 73 of the Indian Code.

Merely showing the summons to the defendant without tendering or delivering a copy is not good service [*Reg. v. Karsunlal*, 5, Bom. Cr. 20].

60 Whenever it may be practicable, the service of summons shall be made on the defendant in person ; but if, after reasonable exertion, the fiscal is unable to effect personal service, he shall report such inability to the court in a fair-written return to the precept, having the summons attached thereto as an exhibit, and it shall be competent for the court, on being satisfied by evidence adduced before it that the defendant is within the island, to prescribe any other mode of service as an equivalent for personal service.

Service to be personal if practicable ; otherwise as court may direct.

See section 75 of the Indian Code.

61 The service substituted by order of the court shall be as effectual as if it had been made on the defendant personally.

Substituted service to be effected as personal,

Where substituted service has been effected, the defendant cannot succeed on a motion to set aside the decree merely on the ground of his having had no notice [*Kessur v. Bhoobunessur, Bourke*, 27].

Substituted service only applied to cases in which there could be—if there were no difficulties in the way—personal service, and was never intended to be allowed where personal service could not be effected, because the plaintiff did not know how to describe the parties he sought to sue [*Sloman v. Government of New Zealand*, 1 C. P. D. 563].

and court to
fix time for
appearance.

62 Whenever service is substituted by order of the court, the court shall fix such time for the appearance of the defendant as the case may require.

This section is the same as section 84 of the Indian Code.

A sufficient time ought to be given for notice of the substituted service to reach the defendant wherever he may be [*Mirza Ally v. Syed Hyder*, I. L. R. 2, Bom. 449].

When more
defendants
than one,
service on
each.

63 When there are more defendants than one, service of the summons shall be made on each defendant.

This section is the same as paragraph 1 of section 74 of the Indian Code.

Agents and
proctors
holding
powers of
attorney to
confess
judgment to
accept
service;

64 When a defendant has an agent appointed under section 30 or a proctor holding a warrant or power of attorney under section 31 empowered to accept service, service of summons on such agent or proctor shall be sufficient. And in the case of an action against partners relative to a partnership transaction, or to an actionable wrong in respect of which relief is claimable from the partners, as a firm, each partner is an agent so empowered of each other partner, as is also the person (if any) not being a partner who has the management of the business of the partnership at the principal place of such business within the local limits of the court's ordinary jurisdiction.

partners, and
manager.

This section is taken largely from section 74 of the Indian Code.

See O. 9, R. 6, under the Judicature Acts.

As to whether this section applies not only to a partnership existing at the time the plaint is filed, but also to a partnership

dissolved before filing the plaint in respect of a cause of action arising during its existence see *Ex parte Young* [19 C. D. 124]. See also *Davis v. Morris* [10 Q. B. D. 436].

65 In an action relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the court from which the summons issued, service on any manager or agent who at the time of service personally carries on such business or work for such person within such limits shall be deemed good service : and for the purpose of this section the master of a ship is the agent of his owner or charterer.

When defendant out of jurisdiction has manager within it.

This section is the same as section 70 of the Indian Code.

The "business" referred to in this section must be either carried on by the agent or manager or form part of the business in the sense of a course of transactions connected with the management to which he has been duly appointed [*Goculdass v. Ganeshlal*, I. L. R. 4, Bom. 416].

66 In an action to recover money due on a mortgage secured upon immovable property, or to obtain relief respecting or compensation for wrong to immovable property, if the service cannot be made on the defendant in person, and the defendant has no agent empowered to accept service, it may be made on any agent of the defendant in charge of the property : but without prejudice to the plaintiff's right to proceed under sections 645, 646, and 647.

Service on agent in charge of immovable property.

See section 66 of the Indian Code.

67 No misnomer or misdescription of any person or place in any such summons, order, or process shall vitiate the same, provided that the person or place be therein described as he or it is commonly known, and provided that such misnomer or misdescription be not such as to mislead the party served therewith.

Misdescription not to vitiate summons, &c.

68 If the defendant be in jail, the summons shall be delivered by the fiscal to the officer in charge of

Service on defendant in jail.

the jail in which the defendant is confined, and such officer shall cause the summons to be served upon the defendant.

The summons shall be returned through the fiscal to the court from which it issued, with a statement of the service endorsed thereon, and signed by the officer in charge of the jail.

See section 87 of the Indian Code.

Service out of
the colony.

Application
for, what.

69 Service of a summons out of the colony may be allowed by the court in all cases in which the court has jurisdiction. Every application for an order for leave to serve such summons on a defendant out of the colony shall be by motion and shall be supported by evidence (by affidavit or otherwise) showing in what place or country such defendant is or may probably be found, and the grounds on which the application is made.

Order for. to
prescribe
mode of.

70 Every order giving leave to effect such service shall prescribe the mode of service, and shall direct that the defendant is to enter appearance within such time after service as the court directs.

Form of
summons.

71 A summons under sections 69 and 70 shall be in the form No. 18 in the second schedule hereto.

Chapter 9.

Defendant to
answer on
day for
appearance.

Of the Appearance and Answer.

72 On the day fixed in the summons for the defendant to appear and answer, if the parties appear in court, the defendant shall be called upon to answer the plaint. If the defendant shall then admit the claim of the plaintiff, the court shall give judgment against the defendant according to the admission so made.

Explanation.—A party appears in court when he is there present in person to conduct his case, or is represented there by a proctor or other duly authorised person.

See section 96 of the Indian Code.

Plaintiffs must be represented by the same pleader or set of pleaders, and cannot generally be represented by different pleaders [*Jankibai v. Atmaram*, 8 Bom. 241].

73 If the defendant does not admit the plaintiff's claim, he shall himself, or his proctor shall on his behalf, deliver to the court a duly stamped written answer; or in the court of requests the defendant may state his answer *vivâ voce* in open court to the commissioner, who shall reduce the same into writing upon a stamp being supplied by the defendant, such as would be required for a written answer; and the said stamp shall be affixed to the record of the said statement, and the statement so taken down and stamped shall in such case be the defendant's answer.

Answer to be in writing; or in court of requests may be given by parol and reduced to writing.

74 In the event of the defendant or his proctor on his behalf not being prepared on the day fixed for appearance and answer to file or state his answer as aforesaid, the court may then, or at any subsequent time, if the action is not sooner determined, upon notice to the plaintiff, and provided cause therefor is shown to the satisfaction of the court, or upon the plaintiff's consent, extend the time for that purpose to a day to be fixed by the court.

Extension of time to answer.

Where a defendant appears and applies for time to file answer, he cannot thereafter move that the plaint be taken off the file as embarrassing and unintelligible. An objection on that ground must be taken at the earliest opportunity, and application for time to answer is a waiver of all objections to the plaint and answer [*Senaniake v. Appu*, 2 S. C. R. 135].

The words, "at any subsequent time," of this section are intended to meet a case of more than one extension of time for filing answer [*Silva v. Babahany*, 1 N. L. R. 145].

Where a defendant took time to file answer, and on the last day moved to take the plaint off the file, and the court after taking time to consider the defendant's motion refused it after some days, *held*, that the fact that the court took time to consider its order should not have been allowed to prejudice the defendant, and he should have been allowed to file his answer on the day on which his motion to take the plaint off the file was refused [*The Ceylon Gemming & Mining Co. v. Symons*, 2 N. L. R. 226].

Requisites of
answer.

75 Every such answer shall be distinctly written in the English language upon good and suitable paper, shall be duly stamped, shall be subscribed by the defendant or his duly constituted representative as in the case of a plaint is provided for the plaintiff's subscription, or if he is represented by a proctor, by such proctor, and shall contain the following particulars :—

- (a) The name of the court, the number of the case, and the date of filing the answer ;
- (b) The name of the plaintiff ;
- (c) The name, description, and residence of the defendant.
- (d) A statement admitting or denying the several averments of the plaint, and setting out in detail plainly and concisely the matters of fact and law, and the circumstances of the case upon which the defendant means to rely for his defence; this statement shall be drawn in duly numbered paragraphs, referring by number, where necessary, to the paragraphs of the plaint.
- (e) When the defendant sets up a claim in reconvention, the answer must contain a plain and concise statement of the facts constituting the ground of such claim which the defendant makes in reconvention. A claim in reconvention duly set up in the answer shall have the same effect as a plaint in a cross action, so as to enable the court to pronounce a final judgment in the same action both on the original and on the cross claim ; but it shall not affect the lien upon the amount decreed of any proctor in respect of the costs payable to him under the decree.

There is no provision for an answer under the Indian procedure, but at any time before or at the first hearing of the suit

parties may tender written statements of their respective cases. See chapter VIII. commencing from section 110 of the Indian Code.

Allegations of fact, which are not denied specifically or by necessary implication, cannot be taken as admitted, there being no provision to that effect in the Code [*Fernando v. The Ceylon Tea Company, Limited*, 3 S. C. R. 35 ; 3 C. L. R. 51].

An alteration of a promissory note must be specially pleaded where the defendant intends to rely on it as a substantive defence. He cannot lead evidence of an alteration under a general plea of *non est factum* [*Carpen Chetty v. Carupen*, 3 S. C. R. 132].

An excuse for non-presentment of a promissory note must be specially pleaded by a statement of facts relied on. When presentment is simply traversed in the answer, evidence of excuse or waiver of presentment is not inadmissible [*Sadayappa v. Lawrence*, 2 C. L. R. 3].

An objection to a pleading for want of particulars is not a matter to be set up by plea. A party requiring more particulars should, before pleading to the merits, take the objection by way of motion to take the pleading off the file [*Mudaly Appuhamy v. Tikerala*, 2 C. L. R. 35].

An objection to a plaint as disclosing no cause of action need not necessarily be taken in the answer, but may be taken *ore tenus* at any time, subject only to the discretion of court as to costs [*Sumana Terumanse v. Kandappu*, 3 C. L. R. 14].

In an action by the payee against the maker of a promissory note containing indorsements, the plaintiff need not aver such indorsements [*Letchiman v. Arunasalam*, 3 C. L. R. 52].

Where in an action for debt, the defendant prefers a claim in reconvention for a smaller amount, leaving an admitted balance in the plaintiff's favour, the greater part of the claim in reconvention being disputed by the plaintiff, the plaintiff is entitled to immediate judgment for the balance so admitted, and is not bound to wait until the trial of the claim in reconvention [*Joseph v. De Run*, 9 S. C. C. 79].

The defendant is entitled to have the whole of his counter-claim adjudicated upon in the one action. So, where a plaintiff, pending action, assigned his interest in it, *held*, that the assignee could not claim to be substituted as plaintiff on the record in respect of the plaintiff's claim only [*Fry v. Vanderspaar*, 9 S. C. C. 207].

A defence of payment and a counter claim for damages which have accrued after the issue of summons cannot be pleaded together in the same answer [*Cornelis v. Silva*, 2 S. C. R. 83].

The defendant may deny plaintiff's claim, plead a set-off, and get a decree for it, though no sum has been found due to the plaintiff [*Hayatkhā v. Abdula*, 6 Bom. 151].

Jurisdiction
of court to be
specially
traversed.

76 If the defendant intends to dispute the averment in the plaint as to the jurisdiction of the court, he must do so by a separate and distinct plea, expressly traversing such averment.

Rejection and
amendment
of answer.

77 If any answer is substantially defective in any of the particulars hereinbefore defined, or is argumentative or prolix, or contains matter irrelevant to the action, the court may, by an order to be endorsed thereon, reject the same or return it to the party by whom it was made, for amendment within a time to be fixed by the court, imposing such terms as to costs or otherwise as the court thinks fit.

If the answer is rejected or left unamended as ordered, the defendant shall be regarded as having failed to file answer.

The order so endorsed shall specify the ground of the rejection.

See section 116 of the Indian Code.

Copy of
answer to be
delivered to
plaintiff.

78 A copy of the answer shall be served on the proctor (if any) of the plaintiff, or left with the secretary or clerk of the court for delivery to the plaintiff, or each of the plaintiffs if more than one.

Chapter 10.

Of the Replication and Further Pleadings.

Replication
may be
allowed,
when :

79 Except in the case of a claim by a defendant in reconvention, no pleading after answer shall be filed except by order of court on special motion to be made after due notice to the other side, and before the day appointed for the hearing of the action, upon such terms as to costs and the postponement of the hearing of the action as the court shall think fit. Such order shall not be made (except in the case of a claim in reconvention on the part of the defendant) unless the

court is satisfied on such motion that the real issues between the parties cannot be conveniently raised without such further pleading. All pleadings after answer shall be subject to the rules prescribed by section 75 relative to the form and substance of the answer, so far as the same can be made applicable, and copies of such pleadings shall be served on the proctor of, or left with the secretary or clerk of the court for delivery to, the opposite party. and further pleadings.

There is no necessity for a replication to an ordinary answer containing a plea in bar by way of confession and avoidance [*Lokuhamy v. Sirimala*, 1 S. C. R. 326 ; 2 C. L. R. 125].

When there is new matter pleaded in the answer by way of defence, and there is no replication, every material allegation is to be deemed to be denied, and the burden of proof of such new matter is on the party asserting it [*ibid.*].

See note to section 75 (*d*).

For observations as to the necessity of meeting by way of replication new matter pleaded in the answer see *Gunewardene v. Jayasundere* [1 C. L. R. 85].

If a defendant's answer contains averments requiring to be met, the plaintiff must meet them either by obtaining leave to reply or by asking the court under section 146 to frame an issue upon the defendant's averments [*Weerawago v. The Bank of Madras*, 2 C. L. R. 11].

It may here be noted that the object of any system of pleading is that each side may be made fully aware of the questions that are about to be argued, in order that each may bring forward evidence appropriate to the issues [see *Sayad Muhammad v. Fatteh Muhammad*, I. L. R. 22, Cal. 324].

Of fixing Day of Trial.

Chapter 11.

80 Forthwith on the expiration of the time allowed for the filing of the defendant's answer, or, where a replication is permitted, on the last day of the time allowed for filing such replication, and whether the same is filed or not, the court shall appoint a day for the hearing and determination of the action, and shall give notice thereof to the parties. Provided that the court may subsequently, on application made by either party, and after hearing both parties, or after proof of notice

Day of trial.

of motion to the absent party, direct that the day for the hearing of any case shall be advanced or deferred.

A reasonable number of cases to be fixed for each day.
Postponement.

81 The court shall, in fixing the day of hearing, be careful not to appoint more cases for one day than there is a probability of the court getting through on that day.

Proviso.

82 When any case is in its turn called on for hearing upon the day appointed therefor, the court may, for sufficient cause to be specified in its written order, direct that the hearing be postponed to a day, which shall be fixed in the order, upon such terms as to costs or otherwise as the court shall think fit. Provided that the court may in its discretion take and deal with a case out of its order in the cause list on any day for good reason to be adjudicated upon and recorded by the court before entering upon the case.

The hearing of a case may, under this section, be postponed for a fixed day, and not generally. An order striking a case off the roll until the decision of a connected case is an order of general postponement, and one that should not be made [*Fernando v. Curera*, 2 N. L. R. 29].

It is the duty of the court to fix a day for the hearing of a case, and not to await an application therefor by the plaintiff [*ibid*].

Undisposed of cases to be placed at the head of the roll.

83 The cases in any day's cause list not disposed of on that day, by reason of want of time, will be placed at the head of the next court-day's cause list, unless the judge direct otherwise.

As soon as the cause list for any day is prepared, legibly-written copies of it in English and the language or languages of the parties shall be placed in some fit and conspicuous place outside the court-house, so that the suitors and all others interested may be enabled readily to be informed of the contents of the same.

Chapter 12.

Of the Consequences and Cure (when permissible) of Default in Appearing or Pleading.

Non-appearance of plaintiff.

84 If the plaintiff fails to appear on the day fixed for the appearance and answer of the defendant, or on

the day appointed for the filing of the answer, or for the filing of the replication, or for the hearing of the action, and if the defendant on the occasion of such default of the plaintiff to appear is present in person or by proctor, and does not admit the plaintiff's claim, and does not consent to postponement of the day for the hearing of the action, the court shall pass a decree *nisi* in the form No. 21 in the second schedule hereto, or to the like effect, dismissing the plaintiff's action, which said decree shall, at the expiration of fourteen days from the date thereof, become absolute, unless the plaintiff shall have previously, on some day of which the defendant shall have notice, shown to the court good cause, by affidavit or otherwise, for his non-appearance.

In case of such cause being shown, the court shall set aside the decree, and shall fix a day for proceeding with the action on such terms as to costs or otherwise as the court shall think fit, and shall cause notice to be issued to the defendant to be ready on that day to proceed with his defence as if it were the day originally appointed for appearance and answer, or for subsequently filing the answer or filing the replication, or for hearing, as the case may be.

If the defendant consents to an adjournment for the purpose either of his answer being filed or of the action being heard, the court shall appoint a day for that purpose and issue notice thereof to the plaintiff.

If, notwithstanding that the plaintiff fails to appear, the defendant admits the plaintiff's claim, judgment shall be given accordingly.

See section 107 of the Indian Code.

An action cannot be dismissed on the ground of the absence of the plaintiff on the day of trial. The proper order in that event is a decree *nisi* under this section [*Silva v. Arnolis*, 3 N. L. R. 108].

On non-
appearance of
defendant,
decree *nisi*.

85 If the defendant fails to appear on the day fixed for his appearance and answer, or if he fails to appear on the day fixed for the subsequent filing of his answer, or for the filing of the replication, or on the day fixed for the hearing of the action, and if the court is satisfied by affidavit of the process server, stating the facts and circumstances of the service, or otherwise, that the defendant has been duly served with summons, or has received due notice of the day fixed for subsequent filing of answer, or of replication, or of the day fixed for the hearing of the action, as the case may be, or if the defendant shall fail to file his answer on the day fixed therefor, and if on the occasion of such default of the defendant the plaintiff appears, then the court shall proceed to hear the case *ex parte* and to pass a decree *nisi* in favour of plaintiff in the form No. 22 in the second schedule hereto or to the like effect, and shall thereupon issue to the defendant a notice of such decree. Such notice shall be served personally unless the court, for sufficient cause to be assigned by it, direct some other mode of service.

“Fails to appear.”—Where on the day fixed for the trial of a case the defendant was absent, but his proctor appeared for him, it was held that the appearance of the proctor took the case out of the operation of this section [*Pieris v. Fernando*, 1 S. C. R. 67].

Under this section it is not sufficient to give the defendant a notice embodying the purport of the decree, but he is entitled to receive an authenticated copy of the decree itself. Such copy must be duly stamped [*Mohottihamy v. Lekam Mahathmaya*, 1 C. L. R. 62].

The court may fix a case for *ex parte* hearing where the defendant takes time to answer but fails to answer on the appointed day. At such hearing the defendant has no right to cross-examine the plaintiff or his witnesses [*Brampy v. Peris*, 3 N. L. R. 34].

If the court is dissatisfied with the evidence adduced at an *ex parte* trial, it should, in an order, point out in what respects the evidence already recorded is defective, and then adjourn either to a day named or *sine die*. The plaintiff may put the

case on the roll when he is able to supplement the defective evidence [*ibid*].

On the day fixed for the hearing of a case the plaintiff's counsel applied for a postponement. The application was refused, and the plaintiff's counsel, not being further instructed, left the court. The suit was then dismissed for want of prosecution—*Held*, that these circumstances amounted to an appearance on the part of the plaintiff [*Rampertab v. Jakeeram*, I. L. R. 23, Cal. 991].

86 If the defendant does not appear on the day appointed in the decree *nisi* for showing cause, and if the court is satisfied that notice of the decree has been duly served, or if, having appeared to the notice, the defendant shall fail to satisfy the court that he had reasonable grounds for the default in appearing or in filing answer, as the case may be, by reason of which the decree *nisi* was passed, then the court shall make the decree absolute, and the order of the court to that effect may be endorsed on the decree *nisi*, or otherwise duly recorded in the proceedings, as is in this Ordinance hereinafter provided.

If defendant fail to excuse his default, decree *nisi* to be made absolute ;

If, however, the defendant shall satisfy the court that there were reasonable grounds for the default upon which the decree *nisi* was passed, then the court shall set aside the decree, and shall order the case to be proceeded with as from the stage at which the default was committed, upon such terms as to costs, notices, or otherwise as the court shall deem fit.

otherwise to be discharged.

In showing cause under this section a defendant may rely upon irregularity in procedure on the part of the plaintiff [*The Gartmore Estate Co. case*, 1 Tamb. Rep. 51].

87 No appeal shall lie against any decree *nisi* or absolute for default ; but if any defendant, against whom a decree absolute for default shall have been passed, shall within a reasonable time after such decree appear and satisfy the court, upon notice to the plaintiff, by good and sufficient evidence, that he was prevented from appearing to show cause against the

No appeal lies against decree for default, but

court may set aside the decree, for cause shown.

Such order appealable.

notice for making the decree absolute by reason of accident or misfortune, or by not having received due information of the proceedings, and shall, if the court shall in its discretion so require, give good and sufficient security to satisfy the plaintiff's claim and costs of action, the court may, upon such terms and conditions as such court shall think it just and right to impose, set aside the decree and direct that the action be proceeded with as from the stage at which the decree was for default of the defendant made.

The order setting aside or refusing to set aside the decree shall be accompanied by a judgment adjudicating upon the facts and specifying the grounds upon which it is made, and shall be liable to an appeal to the Supreme Court.

The mere consent of the plaintiff's proctor will not be reason sufficient to justify the court in setting aside the decree.

See sections 108 and 109 of the Indian Code. Under section 108, if the defendant shows that he was prevented by any sufficient cause from appearing, the court may set aside the decree. A *bonâ fide* mistake, such as supposing a month to mean a calendar month, has been held to be sufficient cause [*Hara-datrai v. Victoria Finance Association*, 3 Bom. 60].

Where a decree is set aside on the application of a defendant against whom it was passed *ex parte*, the case is not re-opened as against a co-defendant who had appeared and defended the suit [*Manaku v. Sitaram*, 1 L. R. 18, Bom. 142].

Where a defendant appears and contests a decree *nisi*, and it is made absolute, no appeal lies against the order making it absolute. The only appeal against an order making a decree absolute is on the ground that the defendant had no information of the proceedings, or was prevented by accident or misfortune from appearing [*Natchiappa v. Muttu Cingany*, 1 S. C. R. 270 ; 2 C. L. R. 110 ; *Silva v. Grero*, 1 N. L. R. 67]. The ruling in these cases was overruled by the judgment in *The Ceylon Gemming & Mining Co. v. Symons* [2 N. L. R. 226], in which it was held that where a defendant appeared on the day appointed in a decree *nisi* for showing cause, and the court not being satisfied with the cause shown entered an order making such decree absolute, an appeal lay from such order.

A court has an inherent right to vacate an order or decree into which it has been surprised by fraud, collusion, or mistake of fact. Where, therefore, a decree was entered for plaintiff with consent of defendant's proctor, and the defendant subsequently denied his proctor's authority to give such consent, and applied to set aside the decree—*Held*, that it was competent to the court, if satisfied as to absence of authority in the proctor to consent, to set aside the decree [*Mohideen v. Kader*, 3 C. L. R. 13].

Where a defendant applied under the corresponding section [section 108] of the Indian Code to set aside an *ex parte* decree on the ground of fraud and failed, and without preferring an appeal against the order instituted a suit praying for the same relief—*Held*, that such a suit was maintainable, and that the fact that his application was unsuccessful, and that he did not appeal against the order rejecting that application, did not disentitle him from prosecuting his remedy by suit on the ground of fraud. *Held* also, that when there is an appeal against a decision, the effect of not appealing is that the decision holds good for what it is worth ; so far as concerns any other modes of relief available, the person not appealing is in no worse position than if he had appealed and failed [*Pran Nath v. Mohesh Chandra*, I. L. R. 24, Cal. 546].

The *onus* of proof lies on the applicant under this section [see *Torab Ali v. Chooramun*, 24 W. R. 262] ; but if he makes out a *prima facie* case, the other party must rebut it [*Jhutoo Kooer v. Lulita*, 22 W. R. 423].

An application by one co-defendant re-opens the case against all the defendants where the objection is common ground to all, otherwise not [*Dookhee v. Rajessuree*, 5 W. R. 371].

This section applies to every case in which a decree is passed against a defendant *ex parte*, either by reason of his non-appearance at the first hearing or at an adjourned hearing [*Jonardan v. Ramdhone*, I. L. R. 23, Cal. 738 ; *Hildreth v. Sayaji*, I. L. R. 20, Bom. 380].

88 If either on the day appointed for the defendant to appear and answer or for the subsequent filing of answer, or for filing the replication, neither party appears when the case is called on, the action shall be struck off the file of cases pending in the court. But the court shall have power, upon the application of either party, if made within a period of time which, under the circumstances, appears to the court reasonable, and upon notice to the other side, to restore the

Neither party
appearing,
case to be
struck off file.

action to the file, upon such terms and conditions as it shall think fit, and to give the requisite directions for the action to be regularly proceeded with.

The order made on any application for the restoration of an action to the file, whether it grants or refuses the application, shall state the ground upon which it is based.

An order directing the action to be struck off the file will not operate as a bar to the institution of a fresh action upon the same cause of action.

The following is an order of the same nature as an order under this section, and is not an order that operates as a bar to the institution of a fresh suit on the same cause of action:—"Parties having failed to take any steps for more than a year and a day, it is ordered that this case be and it is hereby struck off the roll of pending cases for default of proceeding" [*Ponampalam v. Canugasaby*, 2 N. L. R. 23].

Where two or more defendants severally liable.

89 In the case of an action against two or more defendants alleged to be severally liable, where a summons is served upon any of them, the plaintiff may proceed against the person or persons served as if no other defendant were named in the summons. Where it is served upon all of them, the plaintiff may take judgment against one or more of them, where he would be entitled to judgment if the action was against him or them alone. Where judgment is so taken, the plaintiff may proceed in the same action against the other defendants.

One of many defendants appearing, no decree for default need be passed against others.

90 In the case of an action where there are more defendants than one, the court shall not be obliged to pass a decree for default against a defendant for failing to appear at a stage of the action, provided that one defendant at least appears at that stage, against whom the action must proceed.

See sections 105 and 106 of the Indian Code.

*Of Motions.**Chapter 13.**Motions.*

91 Every application made to the court in the course of an action, incidental thereto, and not a step in the regular procedure, shall be made by motion by the applicant in person or his advocate or proctor, and a memorandum in writing of such motion shall be at the same time delivered to the court. In the court of requests such application may be made orally by the applicant in person and then reduced into writing by the court, in accordance with the rules of summary procedure hereinafter prescribed.

An application by an execution-creditor for an order confirming a sale under section 58 of "The Fiscals' Ordinance, 1867," must be made by motion under this section [*Pitche Bawa v. Meera Lebbe*, 2 C. L. R. 174].

There is no necessity for a motion for summons when a plaint is accepted by the court, nor is a motion to forward the case in appeal necessary after the filing of the petition of appeal [*Goonewardene v. Rajapakse*, 1 N. L. R. 217]; nor a motion for probate of a will to issue to an applicant for probate after the application is allowed [*In re the Last Will of Ferdinandus*, 1 N. L. R. 245].

For observations of Bonser, C.J., against the practice of filing motion papers in cases in order to move the court to do certain acts which it is required by the Code to do without being so moved, see *Markar v. Hussen* [2 N. L. R. 218].

A judgment obtained by fraud or passed under a mistake cannot be set aside by mere motion supported by affidavits with notice to the decree-holder. It may be done either by a regular action or, possibly, by application by way of summary procedure as regulated by the Code [*Perera v. Ekanaike*, 3 N. L. R. 21].

*Of the Journal.**Chapter 14.**Journal.*

92 With the institution of the action the court shall commence a journal entitled as of the action, in which shall be minuted, as they occur, all the events in the course of the action—*i.e.*, the original application, and every subsequent step, proceeding, and order; each minute shall be signed and dated by the judge, and the journal so kept shall be the principal record of the action.

Chapter 15.

Of Amendment.

Amendments
of pleadings.

93 At any hearing of the action, or at any time in the presence of, or after reasonable notice to, all the parties to the action before final judgment, the court shall have full power of amending in its discretion, and upon such terms as to costs and postponement of day for filing answer or replication, or for hearing of cause, or otherwise, as it may think fit, all pleadings and processes in the action, by way of addition, or of alteration, or of omission. And the amendments or additions shall be clearly written on the face of the pleading or process affected by the order; or if this cannot conveniently be done, a fair draft of the document as altered shall be appended to the document intended to be amended, and every such amendment or alteration shall be initialled by the judge.

An order allowing an amendment should direct the delivery of the amended pleading within a given time to the opposite party [*The Attorney-General v. Appuhamy*, 2 S. C. R. 15].

Where, on the day of trial, in the presence of parties, the court allowed the plaint to be amended by the addition of certain words, the amendment not being a material one in that it did not alter the issues in the case, *held*, that the defendant was not entitled to a postponement of the case [*ibid*].

If by amendment of the plaint the class of the case is reduced, the stamp duty payable on proceedings after such amendment is as on an action in the lower class [*Perumal v. Terunmanse*, 1 N. L. R. 213].

An order for amendment of a pleading is bad in form if it does not clearly specify the amendments to be made [*Fernando v. Soysa*, 2 N. L. R. 10].

When a plaint is once accepted by the court it cannot be returned for amendment. It is, when so accepted, a part of the record, and can only be dealt with by the court [*ibid*. See also *Ratwatta v. Owen*, 2 N. L. R. 141].

While, in the chapter in the Code dealing with the trial of actions and settlement of issues, there is provision as to amendment of issues and framing of additional issues, there is none as to amendment of pleadings. That is dealt with in this section, by which power is given to the court to amend pleadings. When necessity arises to amend a plaint for the purpose of properly stating the plaintiff's case, the judge should

make the amendments there and then, and not direct the plaintiff to do so [*ibid*].

The Supreme Court will not, ordinarily, interfere with the discretion of a District Court to amend pleadings, but where it appeared that the judge had made alterations in a plaint, but omitted to alter the answer to meet the altered plaint, and thus made the question at issue between the parties more obscure, the Supreme Court set aside the order amending the plaint and remitted the case to the court below to settle the issues, and then to make the amendment in the pleadings so as to harmonise them with the issues framed [*Ratwatte v. Owen*, 2 N. L. R. 141].

The principle by which a court ought to be guided in deciding to alter a pleading is that the alteration will make the real issues clear [*ibid*].

After a plaint has once been accepted, it should not, as a general rule, be amended until after the issues have been settled. The office of an amendment will generally at that stage be to square the plaint with the issues framed [*ibid*].

The amendment of a plaint is in the discretion of the judge, and is not the right of the suitor in all circumstances. It is not enough for a plaintiff to show that the amendment does not alter the character of the suit [*Tapiram v. Sadu*, I. L. R. 21, Bom. 570].

An amendment of a plaint which materially transforms the nature of the claim cannot be made under this section, and certainly not in appeal. This section permits amendment of the plaint before judgment and not after [*Bai v. Mujanlal*, I. L. R. 19, Bom. 303].

Of Discovery, Inspection, Production, Impounding, and Return of Documents. Chapter 16.

94 Any party may at any time before hearing, by leave of the court to be obtained on motion *ex parte*, deliver through the court interrogatories in writing for the examination of the opposite party, or, where there are more opposite parties than one, any one or more of such parties, with a note at the foot thereof stating which of such interrogatories each of such persons is required to answer. Interrogatories.

Provided that no party shall deliver more than one set of interrogatories to the same person without the permission of the court, and that no defendant shall deliver interrogatories for the examination of the

plaintiff unless such defendant has previously tendered his answer and such answer has been received and placed on the record.

For the purposes of this chapter, "opposite party" means a party between whom and the party interrogating an issue has been raised.

This section, with the exception of the last paragraph, is the same as section 121 of the Indian Code. See Judicature Acts, O. 31, R. 1.

Where the opposite party is of unsound mind or a minor no person acquainted with the facts can be called on to answer interrogatories or make an affidavit of documents on his behalf [see *Waghji v. Khabas*, I. L. R. 10, Bom. 167; *Duke v. Stephens*, 30 C. D. 189].

Interrogatories for the purpose of eliciting facts bearing upon issues arising in a suit are limited in operation, and are not permissible in cases where the procedure provided by section 107 is applicable [*Nittomoye v. Soobul*, I. L. R. 23, Cal. 117].

Service of
interrogatories.

95 Interrogatories delivered under the last section shall be served on the proctor (if any) of the party interrogated, or in the manner hereinbefore provided for the service of summons, and the provisions herein contained with regard to service of summons shall, in the latter case, apply so far as may be practicable.

This section is the same as section 122 of the Indian Code.

A party may interrogate his opponent as to every relevant matter on which he could examine him if he thought fit to call him as his witness at the trial [see *Lyell v. Kennedy*, 8 App. Cas. 217, p. 234].

A plaintiff will not be allowed discovery before filing his plaint [see *Hancock v. Guerin*, 4 Ex. D. 3] unless it is clear that he has a good cause of action, but he is unable to state it properly without the information asked for [*Cashin v. Craddock*, 2 C. D. 140. See *Atkinson v. Fosbrooke*, L. R. 1 Q. B. 628].

Where interrogatories are delivered at such a stage of the case as renders them liable to objection as improper, the defendant can, under section 98, refuse to answer, unless sufficient reasons are shown by the plaintiff (section 100) [see *Mercier v. Cotton*, 1 Q. B. D. 4421; *Harboard v. Monk*, 9 C. D. 616; *Eade v. Jacob*, 3 Ex. D. 335].

Defendant cannot obtain discovery until he has filed his written answer [see *Disney v. Longbourane*, 2 C. D. 704; *Holdane v. Eckford*, L. R. 7 Eq. 425].

96 The court, in adjusting the costs of the action, shall, at the instance of any party, inquire or cause inquiry to be made into the propriety of delivering such interrogatories; and if it thinks that such interrogatories have been delivered unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories, and the answers thereto, shall be borne by the party in fault.

Cost of unreasonable interrogatories to be borne by party in fault.

This section is the same as section 123 of the Indian Code. See O. 31, R. 3, under the Judicature Acts.

97 If any party to an action is a body corporate or a joint stock company, whether incorporated or not, or any other body of persons empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply to the court for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly.

Interrogatories to company, &c.

This section is the same as section 124 of the Indian Code. See O. 31, R. 4, under the Judicature Acts.

Ordinarily a member of a corporation will not be directed to answer if it is shown that there is a competent officer, generally the secretary, who has a sufficient knowledge of the facts [*Pavitt v. The Metropolitan Co.*, W. N. 1883, p. 100].

98 Any party called upon to answer interrogatories, whether by himself or by any such member or officer, may refuse to answer any interrogatory on the ground that it is scandalous or irrelevant, or is not put *boná fide* for the purposes of the action, or that the answer will tend to criminate himself, or that the matter inquired after is not sufficiently material at that stage of the action, or on any other like ground.

When party may refuse to answer.

This section is the same as section 125 of the Indian Code. See O. 31, R. 5, under the Judicature Acts.

The party interrogated must object on oath [*McFadden v. Mayor and Corp. of Liverpool*, L. R. 3 Ex. 281].

Interrogatories cannot be framed to anticipate or supply defects of pleading or to ascertain the case of the other side [*Ali Kader v. Gobind Dass*, I. L. R. 17, Cal. 840].

One party may be interrogated as to any admissions he may have made tending to support his opponent's cause of action [*Hodsoll v. Taylor*, L. R. 9, Q. B. 79]; and he cannot object to discovery on the ground that such admissions were made in conversations with a servant or agent of the other party who might be called as a witness [*Bird v. Walzey*, 1 C. B. N. S. 308. See section 23 of the Ceylon Evidence Ordinance].

Interrogatories are not allowed where they relate to the contents of or have a tendency to contradict a written document [*Moor v. Roberts*, 2 C. B. N. S. 680].

Questions going to the credit of a party as a witness are inadmissible [*Allhusen v. Labouchere*, 3 Q. B. D. 654].

Irrelevant interrogatories should not be allowed: there is a distinction between the right to interrogate and the right to cross-examine [*Attorney-General v. Gaskill*, 20 C. D. 519, p. 530; *Owen v. Morgan*, 39 C. D. 316. See *Sivier v. Harris*, W. N. 1876, p. 22, and *Cater v. Leeds Daily News Co. & Jackson*, W. N. 1876, p. 11].

In an action for damages for seduction the defendant cannot be asked how rich he is [*Hudson v. Taylor*, L. R. 9 Q. B. 79].

All questions, though relevant, put *mala fide* with an ulterior object beyond that of helping the suit should be disallowed [*Baker v. Lane*, 3 H. C. 544; explained in *Beckford v. Darcy*, L. R. 1 Ex. 357; *The Mary v. Alexandra*, L. R. 2 A. & E. 319].

Where the *onus* of proof rests on a defendant, then, as a general rule, plaintiff cannot require discovery of the matter for the purposes of the suit [*Joy v. Keckewick*, 2 Ves. 679]. As to the necessity of interrogatories being material at the particular stage of the suit at which they are asked for, see *Morre v. Craven* [L. R. 7 Ch. App. 95].

Questionable or oppressive interrogatories should be struck out [*Winters v. Dabbs*, W. N. 1876, p. 21].

To be
answered
by affidavit.

99 Interrogatories shall be answered by affidavit to be filed in court within ten days from the service thereof, or within such further time as the court may allow.

This section is the same as section 126 of the Indian Code. See O. 31, R. 6, under the Judicature Acts.

Answers though not on oath may, if certified by the person before whom they are made, be admitted with the consent of the other side [*Bacon v. Turner*, W. N. 1876, p. 292].

100 If any person interrogated omits or refuses to answer or answers insufficiently any interrogatory, the party interrogating may apply to the court for an order requiring him to answer or to answer further, as the case may be. And an order may be made requiring him to answer or to answer further, either by an affidavit or by *vivâ voce* examination, as the court may direct: Provided that the court shall not require an answer to an interrogatory which in its opinion need not have been answered under section 98.

Application
for further
answer.

This section is the same as section 127 of the Indian Code. See O. 31, R. 10, under the Judicature Acts.

If the party interrogated omits to answer, the course for the interrogating party is to apply under this section [*Mundle v. Biswas*, I. L. R. 5, Cal. 707].

A party at whose instance interrogatories have been administered must put in the answers as part of his evidence, if he wishes to use them at the hearing [*Gosto Behary Pal v. Pal*, I. L. R. 4, Cal. 836].

It is not sufficient for a party interrogated to speak from his own knowledge: he is bound to speak according to his knowledge, information, and belief [*Minnehaha*, L. R. 3, A. & E. 148; *Bolckow v. Fisher*, 10 Q. B. D. 161].

Answers to interrogatories may be insufficient by reason of containing, in addition to the information asked for, impertinent or otherwise objectionable matter [*Peyton v. Harling*, L. R. 9, C. P. 9; *Lyell v. Kennedy*, 27 C. D. 1, p. 16].

101 Either party may, by a notice issued by order of court, to be obtained on motion *ex parte* within a reasonable time not less than ten days before the hearing, require the other party to admit (saving all just exceptions to the admissibility of such document in evidence) the genuineness of any document material to the action.

Notice to
admit
documents.

The admission shall also be made in writing, signed by the other party or his proctor, and filed in court.

If such notice be not given, no costs of proving such document shall be allowed, unless the court otherwise orders.

If such notice is not complied with within four days after its being served, and the court thinks it reasonable that the admission should have been made, the party refusing shall bear the expense of proving such document, whatever may be the result of the action.

This section is the same as section 128 of the Indian Code. See O. 32, R. 2, under the Judicature Acts.

Notice should be given of *all* documents intended to be used in evidence, whether in possession or otherwise, and even though the opposite party had stated he would not admit them [*Ruther v. Chapman*, 8 M. & W. 388]; even though it might be doubtful whether the document might be legally admitted [*The Cromwell*, L. R. 3, A. & E. 316].

The admission of execution "saving all just exceptions to the admissibility of such document in evidence" does not enable a party to use copies as evidence without laying a foundation for the secondary evidence by giving notice to the opposite party [*Sharp v. Lamb*, 11 A. & E. 805], or prevent the party admitting from objecting on the ground that the document has not been sufficiently stamped [*Vane v. Whittington*, 2 Dowl. N. S. 757]; but an admission of a document made by A as agent is an admission of his authority [*Wilks v. Hopkins*, 1 C. B. 737].

If the party serving notice fails to prove the document, the party refusing to admit will not be liable for the costs of the unsuccessful attempt [*Stracey v. Blake*, 7 C. & P. 404].

Order for
discovery of
document.

102 The court may, at any time during the pendency therein of any action, order any party to the action to declare by affidavit all the documents which are or have been in his possession or power relating to any matter in question in the action, and any party to the action may, at any time before the hearing, apply to the court for a like order.

Every affidavit made under this section shall specify which, if any, of the documents therein mentioned the declarant objects to produce, together with the grounds of such objection.

This section is the same as section 129 of the Indian Code. See O. 31, Rules 12, 13, under the Judicature Acts.

An order for discovery under this section may issue to the plaintiffs, although they are not able to make the required affidavit personally. On such order being served the plaintiffs may, in the first instance, choose the channel through which the discovery should come [*The Commissioners for executing the Office of Lord High Admiral v. Vandelspar*, 1 S. C. R. 105].

An infant party to an action cannot be compelled under this section to give discovery by affidavit and inspection of documents in his possession relating to the suit [*Duncan v. Bhoyro*, I. L. R. 22, Cal. 891. But see *Nathmull v. Malharrao*, I. L. R. 19, Bom. 350].

If it appears that the application is not urgent, and the effect of granting it would be to unduly retard the progress of the suit, it should be refused [W. N. 1875, p. 238]. It need not contain mention of any documents [W. N. 1876, pp. 22, 24].

The document should be evidence upon any issue, or directly or indirectly bear upon some contention between the parties [*Compagnie Financière v. Peruvian Co.*, 11 Q. B. D. 55, p. 63].

The party against whom the order issues must describe all his documents in the affidavit, although he asserts that he cannot be compelled to produce the documents [*Rumbold v. Forfeath*, 3 K. & J. 44]; and the affidavit must be made by the party himself [*Kalian v. Safdar*, I. L. R. 8, Alla. 265]; and where there are several parties all must ordinarily join [*Ryrie v. Shivashankar*, I. L. R. 15, Bom. 7].

For form of affidavit see p. 154, O'Kinealy's Com. on the Ind. Code, 4th ed.

If a party seeking discovery can show from the pleadings, the affidavit itself, or from the documents therein referred to, that there are other documents in the possession or power of the party making the affidavit material or relevant to the suit, the court may compel the latter to make a further affidavit [*Wright v. Pitt*, L. R. 3 Ch. App. 809].

If the affidavit is not verified by the party in the cause, or does not give a distinct description of the documents, the party seeking discovery can take out a summons to consider the sufficiency [*Kalian v. Safdar*, I. L. R. 8, Alla. 265; *Oriental Bank v. Brown*, I. L. R. 12, Cal. 265]. If the court is satisfied that material documents not mentioned are in the defendant's possession, he will be compelled to make a further affidavit [*Sault v. Browne*, L. R. 17, Eq. 402], and if he does not do so his case may be decided under section 109 [*Kalian v. Safdar*, I. L. R. 8, Alla. 265].

Discovery of documents and inspection may be allowed to a plaintiff from a co-plaintiff, or a defendant to a co-defendant if

there are rights which have to be adjusted between them in the suit [*Shaw v. Smith*, 18 Q. B. D. 193].

Order for
production of
documents.

103 The court may, at any time during the pendency therein of any action, order the production by any party thereto of such of the documents in his possession or power relating to any matter in question in such action or proceeding as the court thinks right; and the court may deal with such documents when produced in such manner as appears just.

This section is the same as section 130 of the Indian Code. See O. 31, R. 11, under the Judicature Acts.

A party who has obtained by interrogatories or as provided in the last section knowledge of the documents in the hands of his adversary may proceed under this section to enforce their production.

The order for production will not be made unless the court is satisfied that the documents are essential to the party's suit at the time they are applied for [*Doorgamonee v. Benodemonee*, W. R. 1864, p. 164].

In deciding the question of relevancy the provisions of section 162 of "The Evidence Ordinance" may be taken as a guide.

The person interrogated may seal up such parts of the document as he swears are privileged [*Talbot v. Marshfield*, L. R. 1, Eq. 6]. In the High Court of Calcutta when the right of a party producing documents to seal certain portions of them is contested, the court appoints an officer to whom the plaintiff states in confidence why he wants to inspect any portion of the documents sealed, and the officer after looking at the documents reports whether and in what way the part sealed or desired to be sealed is material to the case of the other party [*Heeralall Rukhit v. Ram Surun*, I. L. R. 4, Cal. 835].

The court has no discretion as to refusing to allow the production of documents in possession of a party to a suit relating to the matter in issue, unless they are privileged [*Wallace v. Jefferson*, I. L. R. 2, Bom. 453].

Production cannot be enforced of documents in joint possession of the party and a third person not joint in suit [*Hadley v. McDougall*, I. L. R. 7 Ch. App. 312].

See section 163 of "The Evidence Ordinance."

Notice to
produce
documents
for
inspection.

104 Any party to an action may, at any time before or at the hearing thereof, by motion *ex parte* obtain an order of court for notice to issue to any other

party in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his proctor, and to permit such party or proctor to take copies thereof.

No party failing to comply with such notice shall afterwards be at liberty to put any such document in evidence on his behalf in such action, unless he satisfies the court that such document relates only to his own title, or that he had some other and sufficient cause for not complying with such notice.

This section is the same as section 131 of the Indian Code. See O. 31. R. 14, under the Judicature Acts.

If the person appointed to inspect attempt to use the knowledge he obtains by that inspection for any purpose other than the purposes of the action, he would be guilty of contempt [*Dadswell v. Jacobs*, 34 C. D. 278, p. 282].

Where a party or his pleader desires inspection with the assistance of a person having technical knowledge of the subject of which the document treats, a special application for such inspection should be made [*Swansea Vale Railway Co. v. Budd*, L. R. 2, Eq. 274].

105 The party to whom such notice is given shall, within ten days from the receipt thereof, deliver through the court to the party giving the same a notice stating a time within three days from such delivery at which the documents, or such of them as he does not object to produce, may be inspected at his proctor's office or some other convenient place, and stating which, if any, of the documents he objects to produce, and on what grounds.

Time and place of such production to be specified by party receiving notice ;

This section is the same as section 132 of the Indian Code. See O. 31, R. 16, under the Judicature Acts.

Where the action refers to a contract to be performed at the place where the defendant usually carries on his business, he can insist upon inspection of his books at that place [*Kevaldas v. Pestonji*, I. L. R. 5, Bom. 467].

106 If any party served with notice under section 104 omits to give notice under section 105 of the time

otherwise, order for

inspection to
be made by
court.

for inspection, or objects to give inspection, or names an inconvenient place for inspection, the party desiring it may apply to the court for an order of inspection.

This section is the same as section 133 of the Indian Code. See O. 31, R. 17, under the Judicature Acts.

Application
for order to
be supported
by affidavit.

107 Except in the case of documents referred to in any pleading or affidavit of the party against whom the application is made, or disclosed in his affidavit of documents, such application shall be founded upon an affidavit showing (a) of what documents inspection is sought, (b) that the party applying is entitled to inspect them, and (c) that they are in the possession or power of the party against whom the application is made.

This section is the same as section 134 of the Indian Code. See O. 31, R. 18, under the Judicature Acts.

This section only gives a right to such documents as the party has a *prima facie* right to inspect, and does not enlarge the ordinary rule [*Mullock v. Heath*, W. N. 1875, p. 291].

Court may
reserve
question as to
discovery or
inspection.

108 If the party from whom discovery of any kind or inspection is sought objects to the same or any part thereof, and if the court is satisfied that the right of such discovery or inspection depends on the determination of any issue or question in dispute in the action, or that for any other reason it is desirable that any such issue or question should be determined before deciding upon the right to the discovery or inspection, the court may order that the issue or question be determined first, and reserve the question as to the discovery or inspection.

This section is the same as section 135 of the Indian Code. See O. 31, R. 19, under the Judicature Acts.

The cause should be heard by the judge who decides such an issue as that referred to in this section [*Ahmedbhoy v. Vulleebhoy*, I. L. R. 6, Bom. 572].

Consequence
of not
complying

109 If any party fails to comply with any order under this chapter to answer interrogatories, or for

discovery, production, or inspection, which has been duly served, he shall, if a plaintiff, be liable to have his action dismissed for want of prosecution, and if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not appeared and answered.

with order
under this
chapter.

And the party interrogating or seeking discovery, production, or inspection may apply to the court for an order to this effect, and the court may make such order accordingly.

Any party failing to comply with any order under this chapter to answer interrogatories, or for discovery, production, or inspection which has been served personally upon him, shall also be deemed guilty of the offence of contempt of court.

This section is the same as section 136 of the Indian Code. See O. 31, R. 20, under the Judicature Acts.

Until an order has been passed under section 100 no action can be taken under this section [*Prem Sukh v. Indronath*, I. L. R. 18, Cal. 420].

A case will not be dismissed or a defence struck out except as a last resort [W. N. pp. 201, 2; *Kalian Bibi v. Safdar*, I. L. R. 8, Alla. 266].

The party against whom the order is passed can apply to have it set aside [*Khajab v. Abdool*, I. L. R. 9, Cal. 923].

110 The court may of its own accord, or in its discretion upon the application of any of the parties to an action, send for, either from its own records or from any other court, the record of any other action or proceeding, and inspect the same.

Court may
inspect
records of
other courts.

Every application made under this section shall (unless the court otherwise directs) be supported by an affidavit of the applicant or his proctor, showing how the record is material to the action in which the application is made, and that the applicant cannot, without unreasonable delay or expense, obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production

of the original is necessary for the purposes of justice. Nothing in this section shall be deemed to enable the court to use in evidence any document which by the law of evidence in force in this Colony would be inadmissible in the action.

This section is the same as section 137 of the Indian Code.

A court has no discretion to refuse to send records which have been demanded under this section [*In the Matter of Golap Coomary*, 4 Cal. L. R. 36].

Parties to be ready with all documents at trial.

111 The parties or their proctors shall bring with them, and have in readiness at the hearing of the action, to be produced when called for by the court, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in court, and all documents which the court at any time before such hearing has ordered to be produced.

This section is the same as section 138 of the Indian Code.

Where a party is not called on by the court, he is not bound to file such documents as are referred to in this section [*Mahbub v. Patasu*, 1 B. L. R. 120].

Document called for and not produced shall not be received afterwards.

112 No documentary evidence in the possession or power of any party which should have been, but has not been, produced in accordance with the requirements of section 111, shall be received at any subsequent stage of the proceedings, unless good cause be shown to the satisfaction of the court for the non-production thereof. And the court on receiving any such evidence shall record its reason for so doing.

This section is the same as section 139 of the Indian Code.

The main object of this section is to prevent the fabrication of evidence during the trial [*Gour Huree v. Pran Huree*, 21 W. R. 42].

Documents to be received by court.

113 The court shall receive the documents respectively produced by the parties at the hearing, provided that the documents produced by each party be accompanied by an accurate list thereof.

The court may at any stage of the action reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

Rejection of irrelevant or inadmissible documents.

This section is the same as section 140 of the Indian Code.

Where anything must be done to obtain a document, it must be done by the party requiring it, and not by the court [*Lekray v. Pale Ram*, 2 Alla. 210].

114 No document shall be placed on the record unless it has been proved or admitted in accordance with the law of evidence for the time being in force. Every document so proved or admitted shall be endorsed with some number or letter sufficient to identify it. The judge shall then make an entry on the record to the effect that such document was proved against or admitted by (as the case may be) the person against whom it is used, and shall in such entry refer to such document by such number or letter in such a way as to identify it with the document so proved or admitted. The document shall then be filed as part of the record.

No documents to be placed on record unless proved.

Proved documents to be marked and filed.

All documents produced at the hearing and not so proved or admitted shall be returned to the parties respectively producing them.

See section 141 of the Indian Code.

115 Notwithstanding anything contained in section 114, the court may, if it sees sufficient cause, direct any document or book produced before it in any action to be impounded and kept in the custody of an officer of the court for such period and subject to such conditions as the court thinks fit.

Court may order any document to be impounded.

This section is the same as section 143 of the Indian Code.

116 When an action has been disposed of, or when the time for preferring an appeal from the decree has elapsed, or if an appeal has been preferred, then after the appeal has been disposed of, any person, whether a party to the action or not, desirous of receiving back

When document admitted in evidence may be returned.

Certain documents not to be returned.

any document produced by him in the action and placed on the record, shall, unless the document is impounded under section 115, be entitled to receive back the same. Provided that a document may be returned at any time, if the person applying for such return deliver to the proper officer a certified copy of such document to be substituted for the original. And provided, further, that no document shall be returned which by force of the decree has become void or useless.

Receipt for returned documents.

On the return of a document which has been admitted in evidence, a receipt shall be given by the party receiving it, in a receipt book to be kept for the purpose.

This section is substantially the same as section 144 of the Indian Code.

Provisions as to documents apply to other material objects.

117 The provisions herein contained as to documents shall, so far as may be, apply to all other material objects producible as evidence.

The same as section 145 of the Indian Code.

Translations of Documents.

Translations of documents.

118 No translation of any document tendered in evidence in any court shall be permitted to be read as a translation of such document, unless the same shall be signed by an interpreter of the Supreme Court, or by a Government sworn translator, or by a sworn translator or interpreter of some district court or court of requests.

Who shall be deemed a translator.

119 No person other than an interpreter of the Supreme Court, or a Government sworn translator, or an interpreter of a district court or court of requests, shall be deemed to be a translator of any court unless he shall have received a certificate from the judge or commissioner of such court that he is competent to fulfil the duties of a translator, and shall have taken an

oath before such judge or commissioner faithfully to perform the duties of his office.

120 No such translator as aforesaid shall be entitled to have or recover in respect of fees for any translation any sum of money in excess of the following rates, viz. :—

Fees of
translators.

For every folio of 120 words ... 33 cents

For every fractional part of a folio 33 cents

Of Witnesses.

Chapter 17.

121 The parties may, after the summons has been delivered for service on the defendant, obtain, on application to the court or to such officer as the court appoints in that behalf, before the day fixed for the hearing, summonses to persons whose attendance is required either to give evidence or to produce documents. A list of witnesses shall be filed in court by the party applying for such summonses, after notice to the other side, and within such time before the trial as the judge shall consider reasonable, or at any time before the trial with the consent of the other side appearing on the face of such list.

Summonses
to witnesses.

The corresponding section of the Indian Code is section 159. The court is bound to issue summonses when asked for as a matter of course [*Kaji v. Haji*, I. L. R. 9, Bom. 308], unless the witnesses are summoned in such numbers or in such a manner as to indicate a vexatious desire of obstructing the course of justice [*Ram Phul v. Wahed*, 14 W. R. 66], or the application has been made at a time when it is absolutely impossible that the witness can be brought in time to be examined before the party calling him closes his case [*Rajendro v. Kumud*, 3 Cal. L. R. 569]. The court is not bound to grant an adjournment owing to the absence of a witness except on good cause shown [*Bai Kali v. Alarakh*, I. L. R. 15, Bom. 86].

122 The party applying for a summons shall, before the summons is granted, and within a period to be fixed by the court, pay into court, or give security for payment of, such a sum of money as appears to the court to be sufficient to defray the travelling and other

Payment of
witness'
costs.

expenses of the person summoned, in passing to and from the court in which he is required to attend, and for one day's attendance. Provided that in the case of a witness residing within four miles of the court at which his attendance is required, no such payment shall be made nor security given: and provided further that the making of any such payment and the giving of any such security shall in no case be a condition precedent to the issue of a summons, but in every case (except the case of a witness residing within four miles of the court) where summons issues without such payment having been made or security given, the witness shall be informed on the face of the summons that such is the case, and that it is not obligatory on him to attend.

See section 160 of the Indian Code.

To be made
before he
gives
evidence.

123 The sum so paid into court, or so secured, shall at latest be paid or tendered to the person summoned at the time when he is called on to give his evidence, if he demands the same.

See section 161 of the Indian Code.

Court may
order a
further sum
to be paid.

124 If it appears to the court or to such officer as it appoints in this behalf that the sum paid into court is not sufficient to cover such expenses, the court may direct such further sum to be paid to the person summoned as appears to be necessary on that account; and in case of default in payment, may, by writ issued to the fiscal, order such sum to be levied by sequestration and sale of the movable property of the party obtaining the summons, as is hereinafter provided; or the court may discharge the person summoned without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

This section is the same as paragraph 1 of section 162 of the Indian Code.

No separate action will lie for a witness' expenses [*Dubois de Suran v. Hurrish Chunder*, 5 W. R., 6].

125 If it is necessary to detain the person summoned for a longer period than one day, the court may from time to time order the party at whose instance he was summoned to pay into court such sum as is sufficient to defray the expenses of his detention for such further period; and in default of such deposit being made may, by writ issued to the fiscal, order such sum to be levied by sequestration and sale of the movable property of the party at whose instance he was summoned; or the court may discharge the person summoned without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

Expenses of
detention.

This section is the same as paragraph 2 of section 162 of the Indian Code.

A witness is entitled to be paid his expenses by the party at whose instance he has been called, although he has not applied for them before giving his evidence [*London, Bombay, and Mediterranean Bank v. Mahomed Ibrahim*, I. L. R. 4, Bom. 619].

126 Every summons for the attendance of a person to give evidence or produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes; and any particular document which the person summoned is called on to produce shall be described in the summons with reasonable accuracy. If money has been deposited or security given for his expenses under the provisions of section 122, the summons shall contain a statement to that effect.

Summons to
specify time,
place, and
purpose of
attendance.

This section, with the exception of the last three lines, is the same as section 163 of the Indian Code.

127 Any person may be summoned to produce a document without being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the

Summons to
produce
document.

summons if he cause such document to be produced, instead of attending personally to produce the same.

Same as section 164 of the Indian Code.

Person in court may be required to produce a document.

128 Any person present in court may be required by the court to give evidence, or to produce any document then and there in his actual possession or power.

Same as section 165 of the Indian Code.

Service of summons.

129 Every summons to a person to give evidence or produce a document shall be served as nearly as may be in the manner hereinbefore prescribed for the service of summons on the defendant; and the rules contained in this Ordinance as to proof of service of summons on the defendant shall apply in case of all summonses served under this section.

Same as section 166 of the Indian Code.

Service must afford reasonable time for attendance.

130 The service shall in all cases be made a sufficient time before the time specified in the summons for the attendance of the person summoned, to allow him a reasonable time for preparation and for travelling to the place at which his attendance is required.

Same as section 167 of the Indian Code.

When summons cannot be served, proclamation may issue.

131 If the fiscal returns to the court that the summons for the attendance of a person, either to give evidence or to produce a document, cannot be served, the court may take evidence touching the non-service.

And upon being satisfied that such evidence or production is material, and that the person for whose attendance the summons has been issued is absconding, or keeping out of the way for the purpose of avoiding the service of summons, the court may in its discretion either issue a warrant for the apprehension of such witness or may issue a proclamation requiring him to attend to give evidence, or produce the document, at a

time and place to be named therein ; and a copy of such proclamation shall be affixed on the outer door of the house in which he ordinarily resides.

If he does not attend at the time and place named in such proclamation, the court may in its discretion, at the instance of the party on whose application the summons was issued, make an order for the sequestration of the property of the person whose attendance is required, to such amount as the court thinks fit, not exceeding the amount of the costs of sequestration and of the fine which may be imposed under section 133.

This section is the same as section 168 of the Indian Code.

It is the duty of a party requiring a proclamation to move the court [*Nund Mohun v. Golucknath*, 11 W. R. 99].

A claimant of property attached under this section is not barred by the sale, but he may bring an action in a civil court [*Queen v. Chumroo*, 7 W. R. Cr. 35].

132 If, on the sequestration of his property, such person appears and satisfies the court that he did not abscond or keep out of the way to avoid service of the summons, and that he had not notice of the proclamation in time to attend at the time and place named therein, the court shall direct that the property be released from sequestration, and shall make such order as to the costs of the sequestration as it thinks fit.

If witness appears. sequestration may be withdrawn.

This section is the same as section 169 of the Indian Code.

133 If such person does not appear, or, appearing, fails to satisfy the court that he did not abscond or keep out of the way to avoid service of the summons, and that he had not notice of the proclamation in time to attend at the time and place named therein, the court may impose upon him such fine, in the case of the court of requests not exceeding fifty rupees, and in the case of the district court not exceeding two hundred rupees, as the court thinks fit, having regard to his condition in life and all the circumstances of the case ; and may

Procedure when witness fails to appear.

order the property sequestered, or any part thereof, to be sold for the purpose of satisfying all costs incurred in consequence of such sequestration, together with the amount of the said fine, if any.

Provided that if the person whose attendance is required pays into court the costs and the fine as aforesaid, the court shall order the property to be released from sequestration.

This section is substantially the same as section 170 of the Indian Code.

A witness is not bound to attend if the trial is fixed for a Sunday [*Queen v. Hargobind*, 8 B. L. R. App. 12].

Court may
summon and
examine as
witnesses
persons
strangers
to the action.

134 Subject to the rules of this Ordinance as to attendance and appearance, if the court at any time thinks it necessary to examine any person other than a party to the action, and not named as a witness by a party to the action, the court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed; and may examine him as a witness, or require him to produce such document.

Same as section 171 of the Indian Code.

Persons
summoned
must attend.

135 Subject as last aforesaid, whoever is summoned to appear and give evidence in an action must attend at the time and place named in the summons for that purpose, and whoever is summoned to produce a document must either attend to produce it, or cause it to be produced, at such time and place.

Same as section 172 of the Indian Code.

When he may
depart.

136 No person so summoned and attending shall depart unless and until—

(a) He has been examined or has produced the document, and the court has risen; or

(b) He has obtained the court's leave to depart.

Same as section 173 of the Indian Code.

137 If any person on whom a summons to give evidence or produce a document has been served fails to comply with the summons, or if any person so summoned and attending departs in contravention of section 136, the court may order him to be arrested and brought before the court. Provided that no such order shall be made when the court has reason to believe that the person so failing had a lawful excuse for such failure.

May be arrested for non-compliance.

Proviso.

When any person so brought before the court fails to satisfy it that he had a lawful excuse for not complying with the summons, he shall be deemed to be guilty of the offence of contempt of court, and punishable therefor.

The corresponding section of the Indian Code is section 174.

138 If any person so apprehended and brought before the court cannot, owing to the absence of the parties or any of them, give the evidence or produce the document which he has been summoned to give or produce, the court may require him to give reasonable bail or other security for his appearance at such time and place as it thinks fit, and on such bail or security being given may release him.

Being so arrested court may release him on bail.

This section is the same as part 2 of section 174 of the Indian Code.

This section does not apply to the case of a person who attends and says he has not the document required [*In re Prem Chand*, I. L. R. 12, Bom. 63].

139 If any person so failing to comply with a summons absconds or keeps out of the way, so that he cannot be apprehended and brought before the court, the provisions of sections 131, 132, and 133 shall, *mutatis mutandis*, apply.

Procedure when witness absconds.

See section 175 of the Indian Code.

Court may
pass decree
against party
refusing to
give evidence.

140 If any party to an action being present in court refuses, without lawful excuse, when required by the court, to give evidence, or to produce any document then and there in his actual possession or power, the court may in its discretion either pass a decree against him, or make such other order in relation to the action as the court thinks fit, or may punish him as for a contempt of court.

This section, with the exception of the words "or may punish him as for a contempt of court," is the same as section 177 of the Indian Code.

If a party (plaintiff) when summoned as a witness refuses to produce accounts relevant and material or to answer a material question, and does not endeavour to purge his contempt, the action may be dismissed [*Katakam v. Bhupalam*, 4 Mad. 142 : *Jeshta Ramji v. Awaker*, 3 Mad. 299].

These rules
to apply to
a party
summoned to
give evidence.

141 Whenever any party to an action is required to give evidence or to produce a document, the rules as to witnesses contained in this Ordinance shall apply to him, so far as they are applicable.

Nothing in this chapter contained shall be deemed in any way to contravene or affect the provisions of Ordinances Nos. 9 of 1852 or 12 of 1864, except in so far as the same may be hereby expressly repealed or modified.

The first paragraph of this section is the same as section 178 of the Indian Code.

Privilege
from arrest.

142 Any person duly and in good faith summoned or ordered to attend for the purpose of being examined in a case is privileged from arrest in a civil action or special proceeding while going to, remaining at, and returning from, the place where he is required to attend.

Chapter 18.
Adjourn-
ments.

Of Adjournments.

143 The court may, if sufficient cause be shown, at any stage of the action grant time to the parties, or to any of them, and may from time to time adjourn the hearing of the action.

In all such cases the court shall fix a day for the further hearing of the action, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment.

Provided that, when the hearing of evidence has once begun, the hearing of the action shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the hearing to be necessary for reasons to be recorded and signed by the judge.

This section is the same as section 156 of the Indian Code.

In India orders under section 156 of the Indian Code are not open to appeal [see section 588 of the Indian Code], but their propriety can be questioned in an appeal from the final decree [sect. 594. See *Bishen v. Rutton*; 30 W. R. 3]. Judges in appeal are not inclined to interfere with the inferior court in exercise of the discretion allowed it to grant or refuse an adjournment [*Simon v. Jorowar*, 24 W. R. 202].

144 If, on any day to which the hearing of the action is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the action in one of the modes directed in that behalf by chapter XII., or make such other order as it thinks fit.

Non-appearance of a party on the postponed day.

The same as section 157 of the Indian Code.

The court is not bound to proceed under chapter XII. [see *Hira Dai v. Hira*, I. L. R. 7, Alla. 538].

145 If any party to an action, to whom time has been granted, fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the action, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the action forthwith.

Default of party to carry out purpose of adjournment.

This section is the same as section 158 of the Indian Code.

Of the Trial.

Chapter 19.

146 On the day fixed for the hearing of the action, or on any other day to which the hearing is adjourned,

Framing of issues.

if the parties are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and the court shall proceed to determine the same. If the parties, however, are not so agreed, the court shall, upon the allegations made in the plaint, or in answer to interrogatories delivered in the action, or upon the contents of documents produced by either party, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to record the issues on which the right decision of the case appears to the court to depend.

Nothing in this section requires the court to frame and record issues when the defendant makes no defence.

Where the respondents on a petition co-operated with the petitioner, and invited the court to determine certain issues, *held*, it was competent to the court to do so, and its decision would be binding on the parties, although the proceedings on the petition were grossly irregular, and the petition should, strictly, have been dismissed when presented [*In the Matter of the Estate of Warnasuriya*, 2 N. L. R. 144].

Where no issue is framed with reference to an averment parties must be held not to have been at issue on the facts averred [*Appuhamy v. Kiriheeny*, 2 N. L. R. 155].

Trial of
issues of law
first.

147 When issues both of law and of fact arise in the same action, and the court is of opinion that the case may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.

Under this section the judge has power, when an issue of law arises in a case, and it appears that the case can be disposed of on that issue only, to try that issue first, postponing the settlement of the issues of fact until he has disposed of the issue of law [*Supramani v. Changarapillai*, 2 N. L. R. 17].

148 If the court is of opinion that the issues cannot be correctly framed without the examination of some person not before the court, or without the inspection of some document not produced in the action, it may adjourn the framing of the issues to a future day to be fixed by the court, and may compel the attendance of such person or the production of such document by summons or other process.

Adjournment
for evidence.

149 The court may, at any time before passing a decree, amend the issues or frame additional issues on such terms as it thinks fit.

Amendment
of issues.

150 The party having the right to begin shall state his case, giving the substance of the facts which he proposes to establish by his evidence.

Statement
and
production of
evidence by
party having
right to
begin.
Rules as to
right to
begin.

Explanation 1.—The plaintiff has the right to begin unless where the defendant admits the facts alleged by the plaintiff, and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

Explanation 2.—The case enunciated must reasonably accord with the party's pleadings, *i.e.*, plaint or answer as the case may be. And no party can be allowed to make at the trial a case materially different from that which he has placed on record, and which his opponent is prepared to meet. And the facts proposed to be established must in the whole amount to so much of the material part of his case as is not admitted in his opponent's pleadings.

See section 179 of the Indian Code.

Where a preliminary issue is raised by the defendant which goes to the root of the case, defendant begins [*Fatmabai v. Aishabai*, I. L. R. 12, Bom. 454, p. 459]. In appeal where the respondent objects that no appeal lies, the appellant begins [*Rustomji v. Kessourji*, I. L. R. 8, Bom. 287].

In a suit for partition the plaintiff and defendant derived title from a common ancestor, and the Crown appeared and was allowed to file answer as an added defendant denying the title of such ancestor to the whole of the land, and itself claiming title to a great portion of the land,—*held*, that the proper procedure was for the plaintiff to begin [*Jayawardena v. Wijesinghe*, 3 N. L. R. 373].

Examination-
in-chief.

151 After stating his case in person, or by his proctor or counsel, the same party shall produce his evidence, calling his witnesses and by questions eliciting from each of them the relevant and material facts to which such witness can speak of his own observation.

Explanation.—The questions should be simple, and so framed as to obtain from the witnesses, as nearly as may be in a chronological order, a narrative of all the facts relevant to the matter in issue between the parties which he has witnessed—*i.e.*, which he has in any manner directly observed or perceived, and no others. And on any disputed point the question should not be such as to *lead*, or suggest, the answer; nor such as to induce a witness, other than an expert, to state a conclusion of his reasoning, an inference of fact, or a matter of belief, in the place of describing what he actually observed.

Also, a general request to a witness to tell what he knows, or to state the facts of the case, is, as a rule, not to be permitted, because it gives an opening for a prepared story. Nothing in this explanation operates to prevent a witness from stating hearsay, or giving any opinion, where the hearsay or opinion is a relevant fact in the case.

A party accepting a judge's ruling or opinion as regards the relevancy of evidence which he proposes to offer, without making any effort to produce it, takes the risk upon himself of losing the case for want of such evidence. If a court refuses to take any evidence tendered, counsel should not submit to such refusal, but should either call the witnesses, propose the questions to be put to them, and have the reasons for the judge's refusal recorded, or should ask him to record that he would not entertain any evidence on the point in question [*Muttusamy v. Ponnien*, 1 N. L. R. 31].

Cross-
examination.

152 After the examination-in-chief by the party who called the witness, the cross-examination of the same witness, if required, shall in like manner be effected by the opposite side, only that in this case leading questions may be put.

Re-examina-
tion.

153 Then shall follow re-examination by the first side, if required, for the purpose of enabling the witness to explain such answers given by him on cross-examination as may have left facts imperfectly

stated by him, and to add such further facts as may have been suggested and made admissible by the cross-examination.

Explanation.—During the course of the examination, cross-examination, and re-examination, the court ought not, as a general rule, to interfere, except when necessary for the purpose of causing questions to be put in a clear and proper shape, of checking improper questions, and of making the witness give precise answers. At the end of it, however, if it has been reasonably well conducted, the court ought to know fairly the position of the witness with regard to the material facts of the case, and it should then put such questions to the witness as it may consider necessary to possess itself of all the detailed relevant facts to which the witness can speak from personal observation, or which bear upon his trustworthiness.

A Judge should not ordinarily interpose after the examination-in-chief has been finished and question the witnesses on the points to which the cross-examination will properly be directed, as to do so may render their subsequent cross-examination ineffective. It is not the province of the court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions; and the court should, as a general rule, leave the witnesses to the pleaders, to be dealt with as laid down in section 138 of the Evidence Ordinance [see *Noor Bux Kasi v. The Empress*, I. L. R. 6, Cal. 279 (1880)]. Though, where a witness is called by the parties and is questioned by the court, no cross-examination is allowed without the leave of the court [see section 165, Ev. Ord., and *R. Sakham*, 11 Bom. H. C. R. 166 (1874)]; yet, if the witness be called by the court, he may be cross-examined in the same manner as if he had been produced by the adverse party [*Tarini Charan v. Dasi*, 3 B. L. R., A. C. 145, 158 (1869); *Empress v. Grish Chunder*, I. L. R. 5, Cal. 614 (1879); see "The Law of Evidence," by Ameer Ali and Woodroffe, p. 829].

154 Every document or writing which a party intends to use as evidence against his opponent must be formally tendered by him in the course of proving his case at the time when its contents or purport are first immediately spoken to by a witness. If it is an original document already filed in the record of some action, or the deposition of a witness made therein, it

Tender of documents in evidence.

must previously be procured from that record by means of and under an order from the court. If it is a portion of the pleadings or a decree or order of court made in another action, it shall not generally be removed therefrom, but a certified copy thereof shall be used in evidence instead.

Records of other actions not to be admitted in bulk.

It shall not be competent to the court to admit in evidence the entire body of proceedings and papers of another action indiscriminately. Each of the constituent documents, pleadings, or processes of the former action, which may be required in the pending action, must be dealt with separately as above directed.

Documents admitted to be marked.

The document or writing being admitted in evidence, the court, after marking it with a distinguishing mark or letter, by which it should, when necessary, be ever after referred to throughout the trial, shall cause it, or so much of it as the parties may desire, to be read aloud.

Explanation.—If the opposing party does not, on the document being tendered in evidence, object to its being received, and if the document is not such as is forbidden by law to be received in evidence, the court should admit it.

If, however, on the document being tendered the opposing party objects to its being admitted in evidence, then commonly two questions arise for the court :—

First, whether the document is authentic—in other words, is what the party tendering it represents it to be ; and secondly, whether, supposing it to be authentic, it constitutes legally admissible evidence as against the party who is sought to be affected by it. The latter question in general is matter of argument only, but the first must be supported by such testimony as the party can adduce. If the court is of opinion that the testimony adduced for this purpose, developed and tested by cross-examination, makes out a *primâ facie* case of authenticity, and is further of opinion that the authentic document is evidence admissible against the opposing party, then it should admit the document as before.

If, however, the court is satisfied that either of those questions must be answered in the negative, then it should refuse to admit the document.

Whether the document is admitted or not, it should be marked as soon as any witness makes a statement with regard to it ; and if not earlier marked on this account, it must, at latest, be marked when the court decides upon admitting it.

It is when an instrument is tendered in evidence as required by this section that objection, if any, should be taken to it on the ground of its being insufficiently stamped [*Kenakal v. Velapillai*, 2 N. L. R. 80].

155 Before a witness is allowed to, in any way, identify a document, he should generally be made, by proper questioning, to state the grounds of his knowledge with regard to it.

Identification of document.

Illustration.

If the witness is about to speak to the act, or factum, of signature he should first be made to explain concisely the occurrences which led to his being present on the occasion of the signing ; and if he is about to recognise a signature on the strength of his knowledge of the supposed signer's handwriting, he should first be made to state the mode in which this knowledge was acquired.

156 The questioning for this purpose should be effected by the party who is seeking to prove the document ; and the opposing party, if he desires to do so, should be allowed to interpose with cross-examination on this point before the document is shown to the witness.

Cross-examination as to knowledge.

157 It is the duty of the court, in the event of a witness professing to be able to recognise or identify writing, always to take care that his capacity to do so is thus tested, unless the opposite party admits it.

Court to see witness thus tested.

158 If on the examination effected for this purpose it appears to the court that the witness was not in fact present at the time of signing, or is not reasonably competent to identify the handwriting, then the court shall not permit him to give his testimony on the matter of the signature.

And to decide on his competency.

159 The signature of a person, which purports or which appears by the evidence to have been written by the pen of another, is not proved until both the fact of

Signature by a mark how proved.

the writing and the authority of the writer to write the name on the document as a signature is proved.

This section applies to the case where the signature is a mark explained by the name written adjacent thereto.

Case of an illiterate person.

160 In the case of an illiterate person, who cannot read, it must also be proved that at the time when his name was written on, or his mark put to, the document, he understood the contents of it. Provided that where the name of such illiterate person shall have been written on, or his mark put to, any document for the purpose merely of attesting the signature of another, it shall not be necessary to prove that he understood the contents of such document, but it shall be sufficient to prove that he was aware of the purpose for which his name was so written or his mark so put, and that the person whose signature he purports to attest was known to him.

Case of documents whose execution need not be proved.

161 When the document purports on the face of it to be so old that proof of the actual execution is not required by law, it is not proved until sufficient evidence has been given to prove both that it comes into court from the proper custody, and that it has continued to be in proper custody throughout the period during which it can be reasonably accounted for.

Copy document when proved.

162 When the document, the admission of which is objected to, is put forward as the copy of an absent original, it is not proved until both such evidence as is sufficient to prove the correctness of the copy, and also such evidence as would be sufficient to prove the original, had it been tendered instead of the copy, has been given.

NOTE.—The question whether a copy document is admissible in evidence between the parties in the place of the original is quite distinct from the question whether the document (original or copy) is admissible as evidence relevant to the issue under trial.

163 When the party beginning has stated his case and adduced his evidence in accordance with the foregoing rules, then the opposing party or parties (if there are more than one, who have distinct cases) shall, in person or by proctor or counsel, state his or their case or cases (and in the latter event in succession), and when the case of each opposing party has been so stated, each such party shall adduce in order his evidence, oral and documentary, and the same shall be received and dealt with precisely as in the case of the party beginning, who shall then be entitled to reply. But where there are several issues, the burden of proving some of which lies on the other party or parties, the party beginning may at his option either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the opposing party or parties: and in the latter case the party beginning may produce evidence on those issues after the other party or parties has or have produced all his or their evidence, and such other party or parties may then reply specially on the evidence so produced by the party beginning, but the party beginning will in that case be entitled to reply generally on the whole case.

On termination of beginning party's case the opposing party to state and prove his in like manner.

Reply.

When rebutting evidence is admissible.

See section 180 of the Indian Code.

164 The court may at any time, whether before or after the examination of a witness by the respective parties or during such examination, put and interpose such questions as it may consider conducive to the attainment of truth and justice. And the answers to such questions shall be made to appear on the face of the record as having been given to the court.

Court may question witness.

165 The court may also in its discretion recall any witness, whose testimony has been taken, for further examination or cross-examination, whenever in the

Or recall witness.

course of the trial it thinks it necessary for the ends of justice to do so.

See section 193 of the Indian Code.

Court may
permit a
departure
from above
rules.

Evidence to
be taken
orally on

166 The court may for grave cause, to be recorded by it at the time, permit a departure from the course of trial prescribed in the foregoing rules.

167 The evidence of the witnesses shall be given orally, as above prescribed, in open court in the presence and under the personal direction and superintendence of the judge.

This section is substantially the same as section 181 of the Indian Code.

If a court refuses to examine witnesses as unnecessary, or tells the party so, and the party does not tender them, the Appellate Court should not, if the matter is brought to its notice, decide the case without hearing the witnesses [*Ram Jewun v. Radha Pershad*, 16 W. R. 109], provided it is satisfied that the witnesses were present and a *bonâ fide* application for their examination was made [*Keenoo Singh v. Eshan Chunder*, 6 W. R. 213].

It is in the discretion of the court of first instance to allow a party to call further evidence after he has closed his case [*Rakhal Dos v. Protap Chunder*, 12 W. R. 455]; but it should not be allowed without some good reason [*Hurro Monee v. Onookool Chunder*, 8 W. R. 461].

When a witness has been examined on behalf of the plaintiff, he cannot be recalled as a witness for the defendant without leave obtained at the end of the first examination [*Mackintosh v. Nobin*, 2 Ind. Jur. N. S. 160].

oath or
affirmation;

168 Witnesses professing to be Christians or Jews who have discretion to understand the nature of an oath, shall be examined upon oath, anything in the Ordinance No. 3 of 1842 to the contrary notwithstanding, unless they state that, according to their religious tenets or on other grounds they object to the taking of an oath, in which case they shall be examined on affirmation. Witnesses not professing to be Christians or Jews shall be examined on affirmation. The same rule shall apply to affidavits. And except when hereinafter otherwise expressly provided, the oath or affirmation shall be administered in open court.

169 The evidence of each witness shall be taken down in writing in the English language by the judge, not ordinarily in the form of question and answer, but in that of a narrative. and in English in narrative form;

A District Judge cannot, even with the consent of parties, depart from the provisions of the law as to how evidence should be given and recorded, and the judgment of the court must be based upon facts declared by law to be relevant and duly proved; and so, where in an action for damages for injury to the person, each party, without objection by the other, put in evidence depositions of witnesses at the trial of the defendant for such injury—*Held*, that the court was wrong in accepting such depositions as evidence in the case [*Punchirala v. Punchi Banda*, 3 N. L. R. 38].

170 The court may of its own motion or on the application of any party take down or cause to be taken down any particular question and answer, or any objection to any question, if there appear to the court any special reason for so doing. but any particular question and answer may be written down;

This section is the same as section 186 of the Indian Code.

171 If any question put to a witness be objected to, and the court allows the same to be put, the judge may in his discretion take down in writing the question, the answer, the objection, and the name of the party making it, together with the decision of the court thereon. also the objection to question which is allowed, and the decision of court thereon.

This section is substantially section 187 of the Indian Code.

Objections to the admission of evidence should be made in the court of first instance, or they will not be listened to in the Court of Appeal [*Kissen v. Ram Chander*, 12 W. R. 13]; and if the evidence has been admitted without objection in the lower court, it must be weighed and not rejected by the Appellate Court [*Bodhnarain v. Omrao*, 13 Moore, 529; *Chinnaji v. Dinkar*, I. L. R. 11, Bom. 320].

172 If on objection made the court refuses to allow the question to be put, the judge shall, on the request of the questioner, take down in writing the question, the objection, and the name of the party making it, together with the decision of the court thereon. Similarly when the objection is upheld.

Remarks of
court on
demeanour
of witness.

173 The court may record such remarks as it thinks material respecting the demeanour of any witness while under examination.

The same as section 188 of the Indian Code.

Witness may
be kept out
of court.

174 The witnesses on either side or on both or all sides shall, on motion of any of the parties, be kept out of court and of hearing, except the witness immediately under examination; nor shall any witness, who shall remain in court or within hearing after order made to that effect, be permitted to give evidence, unless in the case of a witness called to prove some fact which has incidentally become essential in the course of the trial, and the necessity of which could not reasonably have been anticipated. And every witness who has been examined shall be kept separate from, and shall be allowed no communication with, those who still remain to be examined. Provided that it shall be lawful for the court in its discretion to allow any witness to be examined, if it shall think such examination conducive to the attainment of truth or justice, notwithstanding that such witness shall have remained in court or within hearing contrary to such order aforesaid.

Proviso.

List of
witnesses
must be filed.

175 No witness shall be called on behalf of any party unless such witness shall have been included in the list of witnesses previously filed in court by such party as provided by section 121. Provided, however, that the court may in its discretion, if special circumstances appear to it to render such a course advisable in the interests of justice, permit a witness to be examined, although such witness may not have been included in such list aforesaid. Provided also that any party to an action may be called as a witness without his name having been included in any such list.

Proviso.

Court may
forbid

176 The court may forbid any questions or inquiries which it regards as indecent or scandalous, although

such questions or inquiries may have some bearing on the questions before the court, unless they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed. indecent questions.

177 The court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the court needlessly offensive in form. And shall forbid insulting questions.

178 If a witness is about to leave the jurisdiction of the court, or if other sufficient cause is shown to the satisfaction of the court why his evidence should be taken immediately, the court may, upon the application of either party or of the witness, at any time after the institution of the action and before trial, take the evidence of such witness in manner hereinbefore provided. Evidence *de bene esse*.

Where such evidence is not taken forthwith, and in the presence of the parties, such notice as the court thinks sufficient of the day fixed for the examination shall be given to the parties.

The evidence so taken may be read at any hearing of the action, provided that the witness cannot then be produced.

179 The court may at any time, for sufficient reason, order that any particular fact or facts may be proved by affidavit, or by depositions taken on commission, instead of by the testimony of witnesses given *vivâ voce* before it, or that the affidavit, or deposition taken on commission, of any witness may be read at the hearing of the action on such conditions as the court shall think reasonable. Provided that when it appears to the court that either party *bonâ fide* desires the production of a witness before the court for cross-examination *vivâ voce*, and that such witness can be so produced, an order shall not be made authorising the evidence of such witness to be given otherwise than *vivâ voce*. Evidence taken on affidavit or on commission. Proviso.

This section is substantially the same as section 194 of the Indian Code. See O. 37, R. 1, under the Judicature Acts.

Affidavits cannot be used without an order of court, not at all if the opposite party desires the production of the witness for cross-examination [*Blackburn Union v. Brooks*, 7 C. D. 68].

Court may
examine
witness
vivâ voce
notwith-
standing
affidavit or
commission.

180 In the event of an order having been made for the proof of facts by affidavit, or by deposition taken on commission, the court may, nevertheless, at the instance of either party order the attendance of the declarant or deponent at the hearing of the action for *vivâ voce* cross-examination, if he is in the island and can be produced.

The corresponding section to this in the Indian Code is section 195. See O. 37, R. 2, under the Judicature Acts.

In interlocutory proceedings cross-examination will not be allowed on affidavit, because it would defeat the object of the whole proceeding, which is despatch. In final proceedings cross-examination will be allowed [see O'Kin. Com. 4th Ed., p. 194].

Affidavits.

181 Affidavits shall be confined to the statement of such facts as the declarant is able of his own knowledge and observation to testify to, except on interlocutory applications, in which statement of his belief may be admitted, provided that reasonable grounds for such belief be set forth in the affidavit.

This section is the same as paragraph 1 of section 196 of the Indian Code. See O. 37, R. 3, under the Judicature Acts.

Petitions.

182 A petition stating facts of observation and belief is not converted into an affidavit by the addition of a verifying clause, on affirmation or oath, to the effect that the statements in the petition are true.

Who may
administer
oaths.

183 In the case of any affidavit under this chapter—

(a) Any court, or magistrate, or justice of the peace, or

(b) Any officer whom the Supreme Court may appoint for the purpose (and who shall be styled "Commissioner to administer Oaths") may administer the oath to the declarant.

The section corresponding to this in the Indian Code is section 197.

The jurat should describe the person before whom the affidavit has been sworn, so that it may appear to have been taken by a competent authority [see O'Kin. Com. 4th Ed., p. 195].

Judgment and Decree.

Chapter 20.

184 The court, upon the evidence which has been duly taken or upon the facts admitted in the pleadings or otherwise, and after the parties have been heard either in person or by their respective advocates or proctors (or recognised agents), shall, after consultation with the assessors (if any), pronounce judgment in open court, either at once or on some future day, of which notice shall be given to the parties or their proctors at the termination of the trial.

Judgment
when
pronounced.

On the day so fixed, if the court is not prepared to give its judgment, a yet future day may be appointed and announced for the purpose.

The corresponding section in the Indian Code is section 184.

There is no objection to a judge at the close of the hearing of a suit stating at once orally the judgment which he intends to record and deliver, but it would not be a judgment. He must afterwards pronounce his written judgment in open court [5 Mad. 8].

When a case is closed by both parties, and judgment is reserved, the court has no power thereafter to call for further evidence, but is bound to give judgment on the materials on the record [*Fernando v. Johanes*, 1 S. C. R. 262].

185 A judge may pronounce a judgment written by his predecessor, but not pronounced.

Who may
pronounce.

This section is the same as section 199 of the Indian Code.

186 The judgment shall be written in English, and shall be dated and signed by the judge in open court at the time of pronouncing it.

To be written
in English.

The corresponding sections in the Indian Code are sections 200 and 202.

The date must be that on which the judgment is delivered [*Mamtazul v. Milhai*, I. L. R. 9, Cal. 711].

A judge may lawfully append to his judgment after it is delivered such additional reasons as might tend more fully to show the correctness of the decision at which he had arrived, provided the further grounds did not alter the ground on which the decision proceeded [*Snadden v. Todd, Finlay & Co.*, 7 W. R. 286]. But see *Richer v. Voyer*, 5 App. Cas. 481.

It is the duty of every judge to proceed, as far as his court will allow him, to recall and cancel any invalid order which he has made *per incuriam* [*Tuffuzool v. Rughoonath*, 8 B. L. R. 186; *Luchman v. Mohan*, I. L. R. 2, Alla., at p. 505].

In England, a judge may always reconsider his decision until the order is drawn up. [*In re St. Nazaire Co.*, 12 C. D., at p. 91.]

**Requisites
of judgment.**

187 The judgment shall contain a concise statement of the case, the point for determination, the decision thereon, and the reasons for such decision; and the opinions of the assessors (if any) shall be prefixed to the judgment and signed by such assessors respectively.

The corresponding section of the Indian Code is section 203.

A judge should not without giving evidence import into his judgment his knowledge of any particular fact [*Hurpurshad v. Sheo Djal*, 3 Ind. App. 286. See *Empress v. Donnelly*, I. L. R. 2, Cal. 405]. In a case in which the principal point at issue was the legitimacy of the plaintiff, and the judge was influenced by the resemblance he bore to the person he claimed as his father, who had been personally known to the judge, it was held that the decision of the judge upon the personal resemblance could not be received or acted on by a court of appeal [*Jeswunt Singjee v. Jet Singjee*, 2 Moore, 245].

In construing a judgment, if a difficulty is found in reconciling the conclusion ultimately arrived at with a previous part of the judgment, such part must be rejected [*Bykunt v. Dhurput*, 19 W. R. 104].

Decree.

188 As soon as may be after the judgment is pronounced, a formal decree bearing the same date as the judgment shall be drawn up by the court in the form No. 41 in the second schedule hereto, or to the like effect, specifying in precise words the order which is made by the judgment in regard to the relief granted or other determination of the action. The decree shall also state by what parties and in what proportions costs

are to be paid, and in cases in the courts of requests shall state the amount of such costs. The decree shall be signed by the judge.

The corresponding provision in the Indian Code is that in paragraph 1 of section 206.

An order ending thus—"It is ordered that the libel be rejected, as it has not been amended as directed by the court. The plaintiff will pay the defendant his costs of the action"—is an order complete in itself, and not requiring to be followed by a formal decree, and is a final order against which an appeal lies [*Davidson v. Silva*, 2 S. C. R. 10].

A person who has ceased to hold office as District Judge has no power to sign the formal decree consequent on a judgment delivered by him when in office [*Davidson v. Silva*, 2 S. C. R. 10]. But a decree being merely the formal expression of the results arrived at by the judgment, it is not necessary that it should be drawn up and signed by the judge who pronounced the judgment. That may be done by any judge of the court [*Fernando v. The Syndicate Boat Co. Ltd.*, 2 N. L. R. 206].

As to particular orders amounting to decrees see O'Kin. 4th Ed., p. 201.

In a suit against a legal representative the decree should state that it is against the defendant in that character [*Giraharlal v. Baishir*, I. L. R. 8 Bom. 309].

The construction of a decree must be governed by the pleadings and judgment [*Robinson v. Duleep Singh*, 11 C. D. at p. 813; *Sankara v. Kalu*, I. L. R. 14 Mad. 29].

Where a decree is joint and several, the fact that one debtor has paid his share of an instalment will not modify his liability if default be made by another judgment-debtor [*Salig v. Ram Sewuk*, 2 Agra, Mis. 14].

It may here be mentioned that where a judgment is obtained by fraud, and a *prima facie* case to that effect is made out, the Supreme Court in revision would remit the case to the judge who pronounced the decree, directing him to rescind it or affirm it after a further hearing. The procedure in such case is an application to the Supreme Court, supported by affidavit, for an order on the lower court to review the decision. A party who has been compelled to pay money in execution of a judgment since rescinded may recover the money so paid by an *actio indebiti* [*Gooneratne v. Dingiri Banda*, 1 Tamb. Rep. 29].

189 If the decree is found to be at variance with the judgment, or if any clerical or arithmetical error be found in the decree, the court shall, of its own motion

When it may be amended.

Proviso.

or on that of any of the parties, amend the decree so as to bring it into conformity with the judgment or to correct such error : Provided that reasonable notice has been given to the parties or their proctors of the proposed amendment.

This section is the same as paragraph 2 of section 206 of the Indian Code.

Where a decree is entered omitting an order as to costs, it may be amended by adding such order. Such amendment should not, however, be made on an *ex parte* application [*Sinappu v. Punchappu*, 1 S. C. R. 121].

A District Judge may amend his decree so as to bring it in conformity with his judgment, but he has no power to vary or re-open his judgment and correct what he may consider to be a mistake he has made on the facts [*Dabere v. Markar*, 1 S. C. R. 210].

A decree duly entered cannot be altered by the court which entered it except for error on the face of it as provided by this section, or new matter subsequently discovered, or fraud. A court cannot order any inquiry into the truthfulness of evidence it has once accepted. When any other remedy is open to a party, the extraordinary one of *restitutio in integrum* is not granted [*Carlill v. Cader Batcha*, 1 Tamb. 18].

In "*The St. Coombs Estate case*" [1 Tamb. 27] the Supreme Court granted an applicant leave to apply to the original court to have its decree set aside to the extent of an arithmetical error, the same having been discovered after judgment in appeal had been delivered.

There is no limitation for an application under this section to amend a decree. It is the duty of the court to amend it whenever it is found to be not in conformity with the judgment [*Kalu v. Latu*, I. L. R. 21 Cal. 259].

The jurisdiction of a court to amend a decree under this section is ousted by confirmation of the decree in appeal [*Pichuvayyanganar v. Seshayyanganar*, I. L. R. 18 Mad. 214].

The court should not amend except in accordance with this section [*Abdul v. Chunia*, I. L. R. 8 Alla. 377].

Where a decree requires amendment, the party aggrieved should apply to the court in which it was granted and not appeal [*Bunwaree v. Mudden Mohan*, 21 W. R. 41].

The amended decree is operative from the date of the decree [*Pydel v. Chathappan*, I. L. R. 14 Mad. 150].

As it is the duty of the parties and their pleaders to see that the decree is drawn up in proper form before it is signed, an application to amend should not be entertained if made long

after the date of the decree [*Goluck Chunder v. Gunga*, 20 W. R. 111; *Tasi Ram v. Man Singh*, I. L. R. 8 Alla. 492].

If the Appeal Court merely confirms the decree of the lower court, the latter can amend [*Sundara v. Subbanna*, I. L. R. 9 Mad. 354. But see *Muhammed Sulaiman v. Muhammed Yar*, I. L. R. 11 Alla. 267]. If the court of first instance amends an appellate decree, the order is not one passed under this section, and is open to appeal [*Muhammed Sulaiman v. Fatima*, I. L. R. 11 Alla. 314]. The Appellate Court should not vary a decree not objected to in the first court, or in the grounds of appeal [*McEllister v. Biggs*, 8 App. Cas. 314, p. 317].

190 When the decree relates to immovable property, the property affected thereby shall be described therein by the boundaries and in such other manner by reference to Government surveys or otherwise as may secure, as far as possible, correctness of identification.

When it is for immovable property ;

The section corresponding to this in the Indian Code is section 207.

A party having obtained a decree for possession cannot bring a second action against the defendant for the same property except upon a cause of action that has arisen after execution. He must execute his decree [*Mohunt v. Moonshee*, 20 W. R. 412]. But a second suit will lie for possession against the defendant if the plaintiff has obtained formal possession under the first decree [*Shama Churan v. Madhub Chandra*, I. L. R. 11 Cal. 93].

A decree for possession of land carries with it possession of the buildings erected on it [*Ramdhone v. Ishanee*, 2 W. R. 123].

191 When the action is for movable property, if the decree be for the delivery of such property, it shall also state the amount of money to be paid as an alternative, if delivery cannot be had. for movable ;

This section is the same as section 208 of the Indian Code.

An alternative decree for delivery of the articles claimed or payment of their value is not regular in an action *rei vindicatio*, the question of compensation arising only when it is ascertained that the property could not be restored, and the amount of compensation being dependent on the conduct of the defendant. The provision of this section is, therefore, inconsistent with the Roman-Dutch Law and the provisions of the subsequent sections 320, 321, and 322, and should be disregarded [*Sheik Ali*

v. Currinjee Jafferjee, 1 N. L. R. 117 ; *Sithamparapillai v. Vinaitamby*, 1 N. L. R. 114].

The amount to be paid is generally the value of the property plus damages for the time the plaintiff has been kept out of it [*Bombay Trading Corp. v. Mirzah*, 19 W. R. 123].

for a sum of money.

192 When the action is for a sum of money due to the plaintiff, the court may in the decree order interest according to the rate agreed on between the parties by the instrument sued on, or in the absence of any such agreement at the rate of nine per cent. per annum to be paid on the principal sum adjudged from the date of the action to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the action, with further interest at such rate on the aggregate sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the court thinks fit.

When such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have refused such interest, and a separate action therefor shall not lie.

The section corresponding to this in the Indian Code is section 209.

For an illustration of the mode of calculation of interest under this section see *Muttiah Chetty v. De Silva*, 1 N. L. R. 358.

An agreement for enhanced interest from date of default is not a penalty [*Mackintosh v. Crow*, 1 L. R. Cal. 689] unless coupled with compound interest [*Dip Narain v. Dipan*, 1 L. R. 8 Alla. 185], though if from date of bond it is [*Mathura Persad v. Luggun*, 1 L. R. 9 Cal. 615].

A condition in a decree payable by instalments, that in default of payment of any two instalments the whole amount due and increased interest should be at once recoverable, is not a penalty [*Run Bahadoor v. Roy Narain*, 7 Cal. L. R. 82].

For damages.

193 When the action is for damages for breach of contract, if it appear that the defendant is able to perform the contract, the court, with the consent of the

plaintiff, may decree the specific performance of the contract within a time to be fixed by the court, and in such case shall award an amount of damages to be paid as an alternative if the contract is not performed.

194 In all decrees for the payment of money, except money due on mortgage of movable or immovable property, the court may order that the amount decreed to be due shall be paid by instalments, with or without interest, and the court may in its discretion impose such terms as it may think fit as to giving security for the payments so to be made. Provided always that on failure to pay the first or any other instalment the whole amount, or any balance then due, shall on such failure become immediately payable. Provided also, that if the party ordered to pay by instalments shall appeal against the decree, and the appeal shall be decided against him, his right to pay by instalments shall cease, and the whole amount shall be immediately payable, unless the Supreme Court give express direction to the contrary. Provided also, that no appeal shall lie against the refusal of the court to make an order for payment by instalments.

Court may decree payment at a future time or by instalments.

Proviso 1.

Proviso 2.

Proviso 3.

The section corresponding to this in the Indian Code is section 210. The common ground in both sections ends at the words, "with or without interest," in the fourth line above. The rest of this section does not enter into the Indian Code. Instead thereof there is provision there for order, to be made *after* the passing of the decree, for payment by instalments.

Where judgment has been pronounced for the whole sum claimed, the court has no power under this section to limit by a subsequent order to pay by instalments the right of the creditor to enforce the decree [*Pieris v. Ranasinghe*, 1 S. C. R. 265; *Carpen v. Nallan*, 2 C. L. R. 111].

This section confers no authority on the courts to relieve a contracting party from an express stipulation, in a bond payable by instalments, as to the consequence of default in punctual payment of the instalments [*Ragho Govind v. Dipchund*, I. L. R. 4 Bom. 96].

The procedure under this section should be adopted when the defendant shows *bona fides* by offering to pay anything like a

fair proportion of his debt at once [*Subatollah v. Thompson*, 1 Hyde 98]; or his inability to pay arises from civil disturbances and not the ordinary vicissitudes of trade [*Khoda Buksh v. Abdool Rahman*, S. D. N. W., 1863, p. 489]; otherwise, if the judgment-debtor has failed to fulfil his ordinary engagements, for then *prima facie* he is deserving of no further indulgence [*Jafree Begum v. Ahmed Hossein*, 1 Agra 270].

The power given under this section should be exercised with a due consideration for the interests of the creditor as well as those of the debtor [*Koover v. Kishun*, S. D. N. W., 1861, p. 656; *Hur Gobind v. Hurkho*, 1 Agra 116].

As to the interpretation of "instalments," see *Chunder v. Bissesswaree*, 13 Cal. L. R. 243; *Asmathulah v. Kally*, I. L. R. 7 Cal. 56; *Mon Mohun v. Durga Churn*, I. L. R. 15 Cal. 502.

Set off.

195 If the defendant shall have been allowed to set off any demand against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount (if any) is due to the defendant, and the mandatory part of the decree shall be for the recovery of any balance which shall on that statement appear to be due to either party. The decree of the court with respect to anything awarded to the defendant on any matter on which the defendant obtains judgment by set-off or in reconvention shall be to the same effect, and be subject to the same rules, as if such thing had been claimed by the defendant in a separate action against the plaintiff.

Reconvention.

Same as section 216 of the Indian Code.

Mesne profits
pending
action.

196 When the action is for the recovery of the possession of immovable property yielding rent or other profit, the court may, whenever the prayer of the plaintiff asks for damages in respect of mesne profits or rent, provide in the decree for the payment of money in lieu of mesne profits or rent in respect of such property from the date of the institution of the action until the delivery of possession to the party in whose favour the decree is made, with interest thereon at such rate not exceeding nine per cent. as the court thinks fit.

Explanation.—"Mesne profits" of property mean those profits which the person in wrongful possession of such property actually received or might, with ordinary diligence, have received therefrom.

This section is substantially the same as section 211 of the Indian Code.

Where a decree is silent as regards mesne profits subsequent to the filing of the suit, a separate suit will lie even if they were asked for in the plaint [*Mon Mohun v. The Secretary of State*, I. L. R. 17 Cal. 968; *Byjnath v. Budhoo*, 10 W. R. 486]; but mesne profits before the institution of the first suit cannot be sued for in a subsequent suit [*Ram Rutton v. Ram Chunder*, 25 W. R. 113; *Venkoba v. Subbanna*, I. L. R. 11 Mad. 151].

197 When the action is for the recovery of possession of immovable property and for mesne profits which have accrued thereon during a period prior to the institution of the action, the court may either determine the amount and make an order for the payment thereof, additional to and embodied in the decree itself, or may pass a decree for the property and reserve the inquiry into the amount of mesne profits to be entered upon after the execution of the decree for the property, as may appear most convenient.

Prior to action.

This section is substantially the same as section 212 of the Indian Code.

198 When the action is for an account of any property and for its due administration under the decree of the court, the court, before making the final decree between the parties, shall order such accounts and inquiries to be taken and made, and give such other directions as it thinks fit.

Interlocutory order for accounts.

This and the next section comprise section 213 of the Indian Code.

199 In the administration by the court of the property of any person who dies after this Ordinance comes into force, if such property proves to be insufficient for the payment in full of his debts and liabilities, the same rules shall be observed as to the

Administration by the court.

respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being with respect to the estates of persons adjudged insolvent.

And all persons who in any such case would be entitled to be paid out of such property may come in under the decree for its administration and make such claims against the same as they may respectively be entitled to by virtue of this Ordinance.

This section and the preceding one comprise section 213 of the Indian Code.

Decree in
action for
pre-emption,
&c.

200 When the action is to enforce a right of pre-emption in respect of a particular sale of property, and the court finds for the plaintiff, if the amount of purchase money has not been paid into court, the decree shall specify a day on or before which it shall be so paid, and shall declare that on payment of such purchase money, together with the costs (if any) decreed against him, the plaintiff shall obtain possession of the property, but that if such money and costs are not so paid on or before such day or any extension thereof which shall have been allowed for good cause shown, the action shall stand dismissed with costs.

This section is the same as section 214 of the Indian Code.

The plaintiff may deduct his costs from the purchase money [*Ishri v. Gopal*, I. L. R. 6 Alla. 352].

Where the decree holder failed to deposit the money within the time prescribed, a subsequent application with the tender of the money was refused [*Shah Ahmed Ali, Petitioner*, S. D. Sum. Decis., December 26, 1840, see O'Kin, 221].

As to the effect of non-payment within time on the grounds of appeal see *Kodai Singh v. Jaisri Singh*, I. L. R. 13 Alla. 376.

As to the case of several pre-emptors each entitled to a decree see *Arjam Singh v. Surfaraz*, I. L. R. 10 Alla. 182.

A pre-emptor can execute the decree for the benefit of a vendee of the property after decree [*Ram Sahi v. Gaya*, I. L. R. 7 Alla. 107].

201 When the action is to enforce a right of sale under a mortgage, and the court finds for the plaintiff, the decree shall specify a day on or before which the money decreed to be due on the mortgage with interest thereon from date of action to date of payment and costs of action shall be paid, and shall direct that in default of such payment within the period so prescribed the mortgaged property shall be sold, and the court may in such decree for sale give such directions as to the conduct and conditions of the sale (including the terms on which the plaintiff shall be allowed to purchase), and the person who shall conduct it, and as to the terms of the instrument of conveyance and the party or parties by whom it shall be executed, as it may think fit.

In action to realise mortgage.

The provisions of this section apply as well to mortgages made before as to those made after the Code came into operation [*Siman v. Nonohamy*, 9 S. C. C. 206].

A mortgagee in execution cannot be restricted to discuss any particular part of the mortgaged property before the other [*Gunesekere v. De Silva*, 1 S. C. R. 195].

Where a mortgage decree was entered on a summons calling upon the defendant to answer only the money claim on the bond, held, that so long as the decree remained on record it bound the land, and could not be questioned by any party claiming the land by title acquired subsequent to such decree [*Rudd v. Loos*, 2 C. L. R. 188].

A court that has jurisdiction to pass a decree for the sale of property comprised in a mortgage has also power to carry out its decree by selling the property, even though a portion be situate outside the local limits of its jurisdiction [*Tincouri v. Shib Chandra*, I. L. R. 21 Cal. 639].

The omission to cause an attachment to be made in execution of a decree for the realisation of a mortgage debt does not affect the validity of a sale of the mortgaged property in execution of such decree [*Tincouri Debya v. Shib Chandra*, I. L. R. 21 Cal. 639].

Interlocutory
order in
action for
dissolution of
partnership.

202 When the action is for the dissolution of a partnership, the court before making its decree may pass an order fixing the day on which the partnership shall stand dissolved, and directing such accounts to be taken and other acts to be done as it thinks fit.

Same as section 215 of the Indian Code.

The order under this section should direct an account to be taken of the dealings and transactions between the parties, and of the credits, property, and effects due and belonging to the late partnership, and it should direct the appointment of a receiver of the outstanding debts and effects. Observations on the procedure to be adopted and the burden of proof on the taking of the account [*Thirukumaresan v. Subharaya*, I. L. R. 20 Mad. 313].

Suit for
account
between
principal
and agent.

203 When the action is for an account of pecuniary transactions between principal and agent, and in all other actions not hereinbefore provided for, where it is necessary in order to ascertain the amount of money due to or from any party that an account should be taken, the court shall before making its decree pass an order directing such account to be taken as it thinks fit.

Same as section 215a of the Indian Code.

Decree or
order
postponing
hearing.

204 When a decree or order made at the hearing of the action is such as to have the effect of postponing the further hearing and the final determination of the action, as for instance a decree for the taking of accounts, or an order for the issue of a commission to take evidence, or of a commission to divide by metes and bounds, it shall specify the time at which the further hearing of the action shall be proceeded with.

Parties
entitled to
certified
copies of
decree and
judgment.

205 Upon being paid such fee as the court shall from time to time determine, the secretary or chief clerk of the court shall at all times furnish to any person applying for the same, and supplying the necessary stamp, copies of the proceedings in any action, or any part thereof, or upon such application

and production of such stamp shall examine and certify to the correctness of any such copies made by such person.

The section corresponding to this in the Indian Code is section 217.

206 The decree or such certified copy thereof shall constitute the sole primary evidence of the decision or order passed by the court.

Decree or copy to be primary evidence of decision.

207 All decrees passed by the court shall, subject to appeal, when an appeal is allowed, be final between the parties ; and no plaintiff shall hereafter be non-suited.

Decrees must be decisive, and must not direct non-suit.

Explanation.—Every right of property, or to money, or to damages, or to relief of any kind which can be claimed, set up, or put in issue between the parties to an action upon the cause of action for which the action is brought, whether it be actually so claimed, set up, or put in issue or not in the action, becomes, on the passing of the final decree in the action, a *res adjudicata*, which cannot afterwards be made the subject of action for the same cause between the same parties.

“Absolution from the instance” is not an admissible form of decree since the Code came into operation [*Sevalingam v. Kumarihami*, 9 S. C. C. 181].

Of Costs.

Chapter 21.

Costs.

208 Under the denomination of costs is included the whole of the expenses necessarily incurred by either party on account of the action and in enforcing the decree passed therein, such as the expense of stamps, of summoning the defendants and witnesses, and of other processes, or of procuring copies of documents, fees and charges of advocates and proctors, charges of witnesses, and expenses of commissioners either in taking evidence or in local investigations, or in investigations into accounts ; and all other expenses of procuring and adducing necessary evidence. Provided that no costs shall be recoverable for or on account of the appearance of any person (not being an

advocate or proctor) on behalf of any party in cases in the courts of requests.

Court always
to have power
to give or
reserve costs.

209 When disposing of any application or action under this Ordinance, whether of regular or of summary procedure, the court may, unless elsewhere in this Ordinance otherwise directed, give to either party the costs of such application or action, or may reserve the consideration of such costs for any future stage of the proceedings; any order for the payment of costs only is a decree for money within the provisions of section 194 as to payment by instalments.

This section is substantially section 218 of the Indian Code. See O. R. 45 under the Judicature Acts.

No action will lie for costs where the court has power to grant them in the original proceedings [*Mohram v. Dass*, 5 W. R. P. C. 59].

By whom
paid.

210 The decree or order shall direct by whom the costs of each party are to be paid, and whether in whole or in what part or proportion.

See section 219 of the Indian Code.

A defendant should not ordinarily be held liable to pay his co-defendant's costs; yet if he has colluded with the plaintiff and induced him to bring the action, he may not only be made to pay his co-defendant's costs, but refused his own [*Bhyroo v. Anoorodeb*, Marsh, 608; *Ram Chunder v. Kisto*, 10 W. R. 194].

Witnesses cannot get costs of appearing by counsel [*In re Brown & Co.*, I. L. R. 14 Cal. 219].

Court may
apportion.

211 The court shall have full power to give and apportion costs of every application and action in any manner it thinks fit, and the fact that the court has no jurisdiction to try the case is no bar to the exercise of such power:

Proviso.

Provided that if the court directs that the costs of any application or action shall not follow the event, the court shall state its reasons in writing.

This section is the same as the first two paragraphs of section 220 of the Indian Code.

As to costs following the event, it was held in *The National Bank of India v. Ponnasamy* [9 S. C. C. 126] that where in a suit the defendant's opposition, based on technical grounds, to an application by the plaintiff was successful, and there was nothing to take the matter out of the general rule that costs follow the event, it is not for the court to speculate as to defendant's motives, or as to the ultimate issue of plaintiff's claim, but that the defendant should be allowed his costs.

The decree must direct by whom and in what proportion the costs should be paid. Any omission to do so is not a mere clerical error, and must be rectified by review [*Ram Sahoy v. Rookhoo* 15 W. R. 414] provided the applicant has not delayed too long [*Oodoy Tara v. Jonab*, 17 W. R. 358].

If a plaintiff mainly succeeds in his claim and it is an honest one, he may be allowed full costs [*Sheo v. Bishonath*, 9 W. R. 61].

A party will not get costs if he has induced the plaintiff to sue him [*Lalla Doss v. Seyed*, 1 Ind. Jur. N. S. 390].

Where the interests of the parties are separate and distinct, separate costs should be allowed to each [*Kosaella v. Beharee*, 12 W. R. 70; *Ram Chunder v. Mutty Lall*, 11 W. R. 19]. But where the defence is common to all, only one set of costs should be allowed [*Francisco de Assis v. Doss Anjos*, 17 W. R. 188; *Juggu Lall v. Biharee*, S. C. N. W. 1859, p. 349].

Where a decree under which costs have been recovered is set aside in appeal an express order is not needed for a refund of the costs with interest [*Dorab Ally v. Abdul Azeez*, I. L. R. 4 Cal. 229].

Costs are not allowed where the parties contend for more than they are entitled [*Ram Koomar v. Kali Krishna*, 13 Ind. App. 122], nor where a party is guilty of costs [*Bhubaneshwari v. Nilkanul*, I. L. R. 12 Cal. 19].

212 The court may direct that the costs payable to one party by another shall be set off against a sum which is admitted or is found in the action to be due from the former to the latter.

Set-off of costs.

But such direction shall not affect the lien upon the amount decreed of any proctor in respect of the costs payable to him under the decree.

See section 111 of the Indian Code. The first paragraph of this section is the same as section 221 of the Indian Code.

213 The court may give interest on costs at any rate not exceeding nine per cent. per annum, and may

Court may give interest on costs.

direct that costs, with or without interest, be paid out of, or charged upon, the subject-matter of the action.

This section is the same as section 222 of the Indian Code.

Costs to be
taxed.

214 All bills of costs, whether between party and party or between proctor and client, shall be taxed by the registrar or secretary or chief clerk of the court, as the case may be, according to the rates specified in schedule 3; and if either party is dissatisfied with this taxation, the matter in dispute shall be referred to the court for its decision, and the decision of the court in review of taxation of costs shall (except when it is the decision of the Supreme Court) be liable to an appeal to the Supreme Court.

As to costs in suits for partition of land see section 6 of Ordinance No. 10 of 1897.

Where costs have been awarded in an incidental proceeding in an action, such as the matter of a claim by a third party to funds in deposit, the costs should be taxed not according to the amount involved in the incidental proceeding, but according to the class of the original action [*Adamjee v. Cader Lebbe*, 1 C. L. R. 66].

The bill of costs in a claim proceeding under section 241 is to be taxed according to the class to be determined, either by the value of the property claimed or the amount of the decree, whichever is less. The court has power under sections 244, 245, and 246 to make order as to payment of costs [*Candeperumal v. Sinnatai*, 1 N. L. R. 128].

Semble, that it is irregular to tax in a bill, as prospective costs, charges for work not yet done [*Fernando v. De Silva*, 2 N. L. R. 223].

Action for
costs by
proctor.

215 No proctor shall commence or maintain any action for the recovery of any fees, charges, or disbursements at law until the expiration of one month or more after he shall have delivered unto the party charged therewith, or left with him at his dwelling-house or last known place of abode, a bill of such fees, charges, and disbursements subscribed by such proctor. And after such delivery or service thereof, either the proctor or party charged therewith may obtain an appointment

from the taxing officer for the taxation thereof ; and if either party shall fail to attend, and the taxing officer is satisfied that such party has received due notice of the appointment, the taxation shall proceed in his absence.

216 If more than one-sixth of the amount of any bill of costs is disallowed by the taxing officer, the proctor shall bear the expense of taxation.

Proctor to bear costs of taxation in what case.

Of Execution.

Chapter 22.

217 A decree or order of court may command the person against whom it operates—

Classification of decrees.

(A) To pay money ;

(B) To deliver movable property ;

(C) To yield up possession of immovable property ;

(D) To grant, convey, or otherwise pass from himself any right to, or interest in, any property ;

(E) To do any act not falling under any one of the foregoing heads ;

or it may enjoin that person—

(F) Not to do a specified act, or to abstain from specified conduct or behaviour ;

or it may, without affording any substantive relief or remedy—

(G) Declare a right or status.

And the method of procedure to be followed, when necessary, by the person party to the action in whose favour the decree or order is made, hereinafter called the decree-holder or judgment-creditor, in order to enforce satisfaction or execution of the decree in each case respectively by the person party to the action against whom the decree is made, hereinafter called the judgment-debtor, is that which is next hereinafter specified according to the above distinguishing heads.

(A)—Execution of Decrees to pay Money.

218 When the decree falls under head (A) and is unsatisfied, the judgment-creditor has the power to

Power of creditor to seize and

sell debtor's property in satisfaction of decree for payment of money.

seize, and to sell or realise in money by the hands of the fiscal, except as hereinafter mentioned, all saleable property, movable or immovable, belonging to the judgment-debtor, or over which or the profits of which the judgment-debtor has a disposing power, which he may exercise for his own benefit, and whether the same be held by or in the name of the judgment-debtor or by another person in trust for him or on his behalf.

Proviso 1.

Provided that the following shall not be liable to such seizure or sale, namely :

Excepted property.

- (a) The necessary wearing apparel, beds, and bedding of the judgment-debtor, or of his wife and children ;
- (b) Tools, utensils, and implements of trade or business, and, where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle and seed grain as may in the opinion of the court be necessary to enable him to earn his livelihood as such ;
- (c) Professional instruments and library necessary for the carrying on of the judgment-debtor's profession or business to the value of five hundred rupees ;
- (d) Books of account ;
- (e) Mere rights to sue for damages ;
- (f) Any right of personal service ;
- (g) Stipends allowed to naval, military, and civil pensioners of Government and political pensions ;
- (h) The salary of a public officer or servant ;
- (i) The pay and allowances of persons to whom the articles of war apply ;
- (j) The wages of labourers and domestic servants ;
- (k) An expectancy of succession by survivorship or other merely contingent or possible right of interest ;
- (l) A right to future maintenance.

Explanation.—The particulars mentioned in clauses (g), (h), (i), and (j) are exempt from sequestration or sale, whether before or after they are actually payable.

Provided also that nothing in this section shall be deemed to affect “The Army Act, 1881,” or any similar law for the time being in force. Proviso 2.

The section corresponding to this in the Indian Code is section 266.

“All saleable property.”—A decree of court comes under this description [*Golam v. Indrachand*, 7 B. L. R. 318].

The doors and windows of a building cannot be separately attached [*Peru v. Ronua*, I. L. R. 11 Cal. 164].

The debtor's interest in money or other securities deposited by him as a security for the performance of his duty is saleable [*Karuthan v. Subramaniya*, I. L. R. 9 Mad. 203].

This section does not prohibit the sale of property specifically mortgaged, although it be the materials of a house [*Bhagundas v. Hathibai*, I. L. R. 4 Bom. 25].

A thing incapable of being estimated or valued, such as “all the claims of A B against all his debtors,” cannot be attached [*Tuffuzul v. Ragunath*, 7 B. L. R. 186].

Private pensions can be attached as debts, but the sums must not be inchoate, but arrears existing and definite [*Tuffuzul v. Ragunath*, 8 B. L. R. 186, pp. 195–196].

219 The party entitled to enforce any decree for the recovery or payment of money may apply to the court for an order that the debtor (or, in the case of a corporation, that any officer thereof) be orally examined before the court on oath or affirmation, as to whether any and what debts are owing to the debtor, and whether the debtor has any and what other property or means of satisfying the decree; and the court may thereon make an order for the attendance and examination on oath or affirmation of such debtor or of any other person whom it thinks necessary, and for the production by such debtor or person of any books or documents. Examination of judgment-debtor as to debts owing to him.

Disobedience by a judgment-debtor of an order under this section to attend court for examination is not punishable as a contempt of court under chapter XVII. of the Code [*Annamalay v. Guneratne*, 1 N. L. R. 49].

Application
need not be
supported by
affidavit.

220 It shall not be necessary to support any such application by affidavits of the applicant's belief that any debts are owing to the debtor, or that he has any other property or means of satisfying the decree.

Costs.

221 The costs of any such application and of any proceedings arising thereout or incidental thereto shall be in the discretion of the court.

Execution of
decree against
legal
representa-
tive of a
deceased
person.

222 If the decree is against a party as the legal representative of a deceased person, and is for money to be paid out of the property of the deceased, it may be executed by the attachment and sale of any such property in the hands or under the control of the party against whom the decree is made.

If no such property can be found, and the judgment-debtor fails to satisfy the court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property not duly applied by him, in the same manner as if the decree had been against him personally.

This section is substantially the same as section 252 of the Indian Code.

The private property of the representative cannot be attached and sold until it is shown on the execution proceedings that he has received assets of the deceased of which he fails to prove a proper disposition [*Wahed Ali v. Jumall*, 18 W. R. 185].

In the Indian Code in place of the words, "If no such property can be found," occur the words, "If no such property remains in the possession of the judgment-debtor," and it was held in *Greender Chunder v. Mackintosh* [4 Cal. L. R. 210] that the creditor must follow the property improperly alienated in a regular suit.

Where a party is sued for money as the heir and possessor of the assets of a deceased debtor, and it is proved that he has received sufficient assets to meet the debt, a personal decree therefor can be passed against him [*Nathuram v. Kutti Haji*, I. L. R. 20 Mad. 446].

Seizure and
sale to be

223 For the purpose of effecting the required seizure and sale in any case the fiscal must be put in

motion by application for execution of decree to the court which made the decree sought to be enforced. effected under order of court.

224 The application for execution of the decree shall be in writing, signed by the applicant or his proctor, and shall contain the following particulars :— Application therefor.

- (a) The number of the action ;
- (b) The names of the parties ;
- (c) The date of the decree ;
- (d) Whether any appeal has been preferred from the decree ;
- (e) Whether any, and what adjustment of the matter in dispute has been made between the parties subsequently to the decree ;
- (f) Whether any, and what previous applications have been made for execution of the decree, and with what result, including the dates and amounts of previous levies, if any ;
- (g) The amount of the debt or compensation with the interest, if any, due upon the decree, or other relief granted thereby ;
- (h) The amount of costs, if any, awarded ;
- (i) The name of the person against whom the enforcement of the decree is sought ;
- (j) The mode in which the assistance of the court is required, whether by the delivery of property specifically decreed, by the arrest and imprisonment of the person named in the application, or by the attachment of his property, or otherwise as the nature of the relief sought may require.

The section of the Indian Code corresponding to this is section 235.

An execution-creditor is entitled to a writ in conformity with his decree [*Gunesekere v. De Silva*, 1 S. C. R. 195].

A judgment-creditor cannot issue execution for a part of the debt, unless he waives his right to recover the rest, and each of several joint judgment-creditors cannot issue separate writs to

recover a fractional share of the debt due to all jointly [*Ibrahim v. Tillekeratne*, 2 S. C. R. 67].

Every adjustment of a decree should be certified to the court whose duty it is to execute the decree, and if the party seeking execution intentionally makes a false statement as to an adjustment, whether certified or not, of the amount still due, he is guilty of an offence under sections 190 and 207 of the Ceylon Penal Code [see *Queen Empress v. Bapuji*, I. L. R. 10 Bom. 288].

If a decree-holder fails to certify satisfaction made out of court, the debtor may recover the amount by an action for damages [*Gunamani v. Prankishori*, 5 B. L. R. 223]; or sue out an injunction prohibiting execution [*Nabokishen v. Debnath*, 22 W. R. 194].

Where there is a joint, or joint and several, decree passed against two or more persons, the decree-holder may execute his decree against any of the persons he may select [*Wahed Ali v. Mullick*, 12 B. L. R. 500]; and execution will not be stopped, though the person proceeded against shows that he has paid his proportionate part [*Salig Ram v. Baboo Ram*, 1 Agra. Mis. 14], or that the decree-holder has given a release to his co-debtors [*Sheo Churn v. Ram Sarun*, 16 W. R. 49].

Where a decree grants different reliefs, as for example, possession of land and mesne profits, it is competent to the decree-holder to execute such decree by means of separate and successive applications in respect of each relief [*Sadho Saran v. Hawal Pande*, I. L. R. 19 Alla 98].

Court to satisfy itself as to conformity of application.

When application should be refused by the court.

225 Upon the application for execution of the decree being made, the court shall satisfy itself by reference, if necessary, to the record of the action in which the decree or order sought to be executed was passed, that the application is substantially in conformity with the foregoing directions, and that the applicant is entitled to obtain execution of the decree or order which is the subject of the application. If the court is not satisfied in these respects it shall refuse to entertain the application, unless and until amended in the particulars in which the court considers it faulty and defective, and with the view to its being so amended the court shall point out these particulars to the applicant; provided that the court may make the requisite amendment then and there, if it is consented

to by the applicant and is such as to admit of being conveniently so effected, and provided further that every such amendment shall be attested by the signature of the judge making it.

In the event of the court refusing to entertain the application, the order of refusal, stating the date both of the application and of the order and the name of the applicant, and specifying the grounds of refusal, shall be endorsed on the application, and the same shall be filed of record in the action.

If the court is satisfied in the respects above indicated, it shall direct a writ of execution to issue to the fiscal in the form No. 43 given in the second schedule hereto.

Writ of
execution.

The section of the Indian Code corresponding to this is section 245.

A decree against A for the rent of one period and against B for another is in fact two decrees, and must be separately enforced to avoid limitation [*Wise v. Rajnarain*, 19 W. R. 30 : 10 B. L. R. 258].

Execution should be in accordance with law, and not by consent of parties [*In re Macfarlane*, 11 W. R. 69].

The holder of a decree under which several persons are jointly liable can proceed against any one of the debtors [*Sreenath v. Saheb*, 12 W. R. 205]. As between debtors jointly liable on a money decree, if one of them purchase the decree it operates as a satisfaction of the entire decree, and execution can no longer be taken out [*Digamburee v. Eshan Chunder*, 15 W. R. 372].

226 Upon receiving the writ, the fiscal or his deputy, or other officer, shall within forty-eight hours after delivery to him of the same, if the debtor shall be a person residing within five miles of the office of the fiscal or deputy fiscal—or if residing beyond five miles, within an additional forty-eight hours for every five miles or part thereof—repair to his dwelling-house or place of residence and there require him, if present, to pay the amount of the writ.

Duties of
fiscal
thereunder.

If by reason of the debtor's absence no demand for the payment is made, or, in the event of any such demand, when made, not being complied with, the fiscal shall forthwith proceed to seize and sell, or otherwise realize in money, such unclaimed property of the judgment-debtor as may be pointed out and surrendered to him for the purpose by the judgment-debtor, or in default thereof such property of the judgment-debtor as may be pointed out by the judgment-creditor, or such property as is specified in the writ, according to the rules next hereinafter contained.

Proviso.

Provided that when the debtor is out of the island, it shall not be necessary to require him to pay the amount of the writ before the execution is carried into effect.

The provision as to surrender of property in this section is very much the same as that in section 32 of Ordinance No. 4 of 1867. Under that it was held in *Mutturassappa v. Weerakoon* [9 S. C. C. 87] that a judgment-creditor has the right to discuss his debtor's property situate within the jurisdiction of the court pronouncing the judgment, and until that is exhausted he cannot be compelled to resort to property outside the jurisdiction.

A Fiscal is not entitled to seize property pointed out by the judgment-debtor until it has been surrendered to him [*Ranesinghe v. Henry*, 1 N. L. R. 303].

Where a judgment-debtor avers that his creditor holds movable property belonging to him as security for the debt, he is entitled to the protection of the court, and it is the duty of the court to inquire into the matter, and for that purpose to suspend execution [*Carupen Chetty v. Siedle*, 3 N. L. R. 363].

Mode of Seizure.

Seizure of movable property in possession of debtor to be manual.

227 If the property sought to be seized and sold or otherwise realized in satisfaction of the decree to be executed is movable property in the possession of the judgment-debtor, other than the property mentioned in the first proviso to section 218, the seizure shall be manual.

The fiscal, deputy fiscal, or other officer may at his discretion permit the owner or possessor of the property or the writ-holder to take charge of the property until the time of sale, on giving security to the satisfaction of such officer that he will in the meantime safely and securely keep the same ; or such officer may, upon the necessary expenses therefor being advanced or secured to him by the debtor or the writ-holder, keep the property in his own custody or in the custody of one of his subordinates, or cause the same to be removed to some fit place of security.

Disposal of property seized until sale.

If such security is not given or such expenses are not advanced or secured, the fiscal, deputy fiscal, or other officer shall make a special return thereof to the court, and shall not be responsible for the due custody of the property so seized.

The expenses of keeping the property in such custody or of removing the same when certified by the fiscal shall, if not paid by the debtor, be a first charge on the proceeds of the property seized or sequestered, provided that the court may, if it thinks fit, reduce the amount of expenses so certified as aforesaid.

Provided that when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody will exceed its value, the fiscal may sell it at once.

Proviso as to perishable property.

The corresponding section of the Indian Code is section 269. The expression in this section, "the seizure shall be manual," would seem to have the same meaning as the substantive provision of the Indian Code that "the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates."

Crops which have not been severed from the ground are not movable property [*Sadhu v. Sandbhu*, I. L. R. 6 Bom. 592 ; *Madayya v. Yenkata*, I. L. R. 11 Mad. 193]. *Fructus naturales* are not movable property, but *fructus industriales* are. See as to this property *Perera v. Ponnutchi* [3 N. L. R. 56] ; *Lee, Hedges v. Seville* [8 S. C. C. 21] ; and *Gunetilleke v. Wasanahani* [3 S. C. C. 80].

As to
attachment
of negotiable
instrument.

228 If the property is a negotiable instrument not deposited in a court, nor in the custody of a public officer, the instrument shall be seized and brought into court and held subject to the further orders of the court.

Substantially the same as section 270 of the Indian Code.

Seizure of
debts, shares,
and movable
property not
in possession
of debtor and
not deposited
in court to be
by written
notice of
prohibition.

229 In the case of (*a*) a debt not secured by a negotiable instrument, (*b*) a share in the capital of any public company or corporation, (*c*) other movable property not in the possession of the judgment-debtor, except property deposited in, or in the custody of, any court, or in the custody of a public officer, the sequestration or seizure shall be made by a written notice signed by the fiscal, prohibiting—

- (*a*) In the case of debt, the creditor from recovering the debt, and the debtor from making payment thereof until the further order of the court from which the writ of execution authorizing the seizure issues ;
- (*b*) In the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon ;
- (*c*) In the case of the other movable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor.

A copy of such order shall be affixed to some conspicuous part of the court-house, and another copy of the same shall be delivered or sent by post, in the case of the debt to the debtor, in the case of the share to the proper officer of the company or corporation, and in the case of the other movable property (except as aforesaid) to the person in possession of the same.

This section is substantially the same as the first part of section 268 of the Indian Code.

Shall be delivered or sent by post to the debtor.”—Service by affixing the copy to the wall of the dwelling-house is not sufficient service [*Gobind v. Khirode*, 10 B. L. R. App. 12].

“A debt not secured,” &c.—A decree for costs is a debt which may be seized in execution under this section ; but notwithstanding the seizure the decree for costs may be executed, but the proceeds must be secured in court, and not paid out without notice to the seizing creditor. The application for execution must be made in the seizing creditor’s suit on notice to him [*Pullenayagam v. Pullenayagam*, 9 S. C. C. 123].

230 A debtor prohibited under clause (a) of the last preceding section may, upon the *ex parte* application of the judgment-creditor, be summoned by the court to show cause, on a day fixed in the summons, why he should not pay to the judgment-creditor the debt due from him to the judgment-debtor, or so much thereof as may be sufficient to satisfy the judgment. If such debtor does not dispute the debt due or claimed to be due from him, and fails within such time as may be allowed him by the court to pay into court the amount due from him to the judgment-debtor, or an amount equal to the judgment, or if he does not appear upon summons, then the court may order execution to issue, and it may issue accordingly to levy the amount due from such debtor, or so much thereof as may be sufficient to satisfy the judgment.

Judgment-debtor’s debtor may be summoned or execution may issue against him.

The costs of any application and of any proceedings arising from, or incidental to, any such application as aforesaid shall be in the discretion of the court.

See section 268 of the Indian Code.

An execution-creditor cannot sue any person having property of his judgment-debtor in his possession. He must proceed under this section [*Mirza v. The widow of Balmakund*, 3 Ind. App. 241, 245].

Under the Indian Procedure [see section 267 and *Harilal v. Abhesang*, I. L. R. 4 Bom. 323] the court can summon any person to ascertain the nature and value of the property.

If in a proceeding under this section the debtor denies the debt, the court cannot make any order on him to pay; but must either appoint a receiver, who can sue for or sell the debt [*Toolsa v. Antone*, I. L. R. 11 Bom. 448].

Payment by him to be a discharge as against judgment-debtor.

231 Payment made by, or execution levied upon, such debtor in manner provided in the last preceding section shall be a valid discharge to him as against the judgment-debtor to the amount paid or levied, although such proceeding may be set aside or the judgment in respect of which any payment or levy is made may be reversed.

See section 268 of the Indian Code.

Seizure of property deposited in any court.

232 If the property is deposited in, or is in the custody of, any court or public officer, the seizure shall be made by a notice to such court or officer, requesting that such property and any interest or dividend becoming payable thereon may be held subject to the further orders of the court from which the writ of execution authorizing the seizure issues:

Provided as to question of title or priority.

Provided that, if such property is deposited in, or is in the custody of, a court, any question of title or priority arising between the judgment-creditor and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment, or otherwise, shall be determined by such court.

Upon such notice being received by any court a memorandum thereof shall be made in the journal of the action in which, or to the credit of any party to which, the money is deposited, or is in the custody of the court.

Explanation.—Money in the hands of the government agent to the credit of an action, or to the credit of any party to an action is, within the meaning of this section, money deposited in, or in the custody of, the court in which the action is.

This section is substantially the same as section 272 of the Indian Code.

The court has no power to refuse an application for attachment under this section [*Noor Jehan v. Mashitty*, 8 Cal. L. R. 17].

Until the proceeds of movable property are appropriated by an order of court to the execution-creditor a mortgagee of such property who has obtained judgment on his mortgage may seize the money, and have the question of preference determined by the court under the provisions of this section [*Meera Saibo v. Muttu Chetty*, 3 C. L. R. 37].

Where an order issued directing a judge to pay certain moneys to A, and the amount was attached by B before payment, it was held that the effect of the order being to vest the money in A, the judge could not go into any question of priority between A and B [*Gopee Nath v. Achcha Bibi*, I. L. R. 7 Cal. 553].

233 The notice necessary to effect seizure under sections 229 and 232 may be signed and served by the fiscal under the authority of the writ of execution alone.

Notice by
fiscal.

234 If the property is a decree for money passed in favour of the judgment-debtor by the court which passed the decree sought to be executed, the seizure shall be made by an order of the court directing the proceeds of the former decree to be applied in satisfaction of the latter decree.

Seizure of a
money decree
in favour of
judgment-
debtor.

If the property is a decree for money passed by any other court, the seizure shall be made by a notice in writing to such court signed by the secretary or clerk of the court which passed the decree sought to be executed, requesting the former court to stay the execution of its decree until such notice is cancelled by the court from which it was sent.

The court receiving such notice shall stay execution accordingly, unless and until—

- (a) The court which passed the decree sought to be executed cancels the notice ; or
- (b) The holder of the decree sought to be executed applies to the court receiving such notice to execute its own decree.

On receiving such application the court shall proceed to execute the decree and apply the proceeds in satisfaction of the decree sought to be executed.

This section is substantially the same as the first part of section 273 of the Indian Code.

Seizure of any
other decrees.

235 In the case of all other decrees the seizure shall be made by an order of the court which passed the decree sought to be executed to the holder of the decree sought to be seized, prohibiting him from transferring or charging the same in any way, and when such decree has been passed by any other court, also by sending to such court a like notice in writing to abstain from executing the decree sought to be seized until such notice is cancelled by the court from which it was sent. Every court receiving such notice shall give effect to the same until it is so cancelled.

See section 273 of the Indian Code.

"All other decrees"—that is, decrees other than money decrees [*Sultan Kuar v. Gulzari*, I. L. R. 2 Alla. 290].

Alienation by
debtor
subsequent to
seizure void
as against
claims
enforceable
under seizure.

236 When a seizure of any negotiable instrument, debt, share, money, decree, or any other movable property has been effected and made known in manner hereinbefore provided, any private alienation of the property seized, whether by sale, gift, mortgage, or otherwise, and any payment of the debt or dividend or delivery of the share to the judgment-debtor during the continuance of the seizure, shall be void as against all claims enforceable under the seizure.

This section is substantially the same as section 276 of the Indian Code.

An attachment does not create any interest or charge upon the property in favour of the attaching creditor as against other creditors [*Soobool Chunder v. Russick Lall*, I. L. R. 15 Cal. 202], but an order of sale, in addition to attachment under a mortgage decree, creates a valid charge on the property [*Suray v. Sheo Pershad*, I. L. R. 5 Cal. 148].

If between the seizure and sale the interest of the debtor in the property becomes enlarged or accelerated, will it not pass by the sale? [*Umes Chunder v. Zahur*, I. L. R. 18 Cal. 164, p. 176. See *Muhammed v. Kutub*, I. L. R. 9 Alla. 136].

If judgment-debtor dies after seizure, his property may be sold without putting his legal representative on the record [*Sheo Prasad v. Hira Lal*, I. L. R. 12 Alla. 440. See *Mina Konwari v. Juggat*, I. L. R. 10 Cal. 196].

Alienation before attachment is good even though the parties may know that a judgment-creditor is seeking to get execution against the property alienated, provided the alienation was *bond fide* and for valuable consideration [*Fegredo v. Mahomed*, 15 W. R. 75].

A debtor may, although unsatisfied decrees be outstanding against him prior to attachment, give a preference to a particular creditor or class of creditors over others, and this notwithstanding that the effect of the alienation or preference may be to defeat the operation of an anticipated execution [*Stephenson v. Bomgartner*, 2 Agra. 104; *Rajan v. Ardesbir*, I. L. R. 4 Bom. 70. See *Puddomonee v. Roy*, 20 W. R. 133; 12 B. L. R. 411].

When an execution sale is set aside on account of irregularity in the proceedings, the attachment remains, so that the decree-holder can again bring it to sale [*Gossain v. Deen Dyal*, 20 W. R. 20].

The alienation is null and void only as against the attaching creditor or persons who may acquire under or through the attachment, and not as against the whole world [*Anund Lall v. Jullodhur*, 10 B. L. R. 134; 17 W. R. 313]. If the decree is subsequently satisfied the alienation is binding on the debtor [*Umesh Chunder v. Roy*, I. L. R. 8 Cal. 279].

A sale to the creditor or the sale or mortgage of the attached property to pay off the judgment-debtor is not void [*Annandananen v. Iyasamy*, 6 Mad. 65; *Balay Ramchandra v. Gajanan*, 11 Bom. 159].

When there is an existing decree the removal of an attachment does not render an alienation made whilst attachment was subsisting a valid one [*Jubraj v. Buhooria*, 7 Cal. L. R. 424, p. 426; *Juggut Narain v. Toolsee Ram*, 10 W. R. 99; *Ram Churn v. Jhubbo*, 14 W. R. 25].

237 If the property is immovable, the seizure shall be made by a notice signed by the fiscal prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from receiving the same from him by purchase, gift, or otherwise.

Seizure of immovable property to be by written notice of prohibition.

Publication
of such
notice.

Registration
of seizures.

The notice shall specify the parties to the action, the judgment-debtor, the dates of judgment and seizure, and the name, situation, and boundaries of the land seized, and shall be proclaimed at some place on or adjacent to such property by beat of tom-tom or other customary mode, and a copy of the notice shall be affixed by the fiscal to a conspicuous part of the property and of the court-house and of the fiscal's office. Upon payment to the fiscal by the decree-holder of a fee of fifty cents, the fiscal shall forthwith transmit a copy of such notice to the registrar of lands of the district in which such land is situate, and such registrar shall within two weeks of the date of seizure register the particulars contained in such notice in a book to be by him kept for that purpose. In case the seizure is removed or the property seized is sold, and the fiscal grants a conveyance thereof to the purchaser under section 286, the fiscal shall, upon payment of a fee of fifty cents by any person at whose instance or for whose benefit such removal is made, or by the person in whose favour such conveyance is granted, certify such removal or sale to the registrar, who shall forthwith register such removal or sale in the same book, which shall be open to the inspection (upon written application on that behalf) of any person upon payment of a fee of twenty-five cents.

But in no case shall the fiscal enter upon actual possession of the immovable property so seized, or receive the rents and profits thereof, unless expressly directed so to do by order made under chapter L.

The section corresponding to this in the Indian Code is section 274.

A mortgage debt must be seized under this section [see *Appasamy v. Scott*, I. L. R. 9 Mad. 5], and a court can sell a mortgage bond covering lands lying wholly outside its jurisdiction [*Balkrishna v. Masuma*, I. L. R. 5 Alla. 142, p. 157].

It is not necessary to issue an attachment in the case of a mortgage decree where the decree contains a direction to sell [*Dayachand v. Hemchand*, I. L. R. 4 Bom. 515].

A mortgage decree may be immovable property within this section [*Hari v. Ram Chandra*, 9 Bom. 64].

Omission to proclaim by beat of tom-tom is a material irregularity [*Primbak v. Nana* I. L. R. 10 Bom. 504].

The copy of notice must be affixed on a conspicuous part of the property, but not on every lot if the property is broken into lots for sale [*Kalitara v. Ram Coomar* 9 Cal. L. R. 114; *Antoneo v. Jalbhoy*, I. L. R. 12 Bom. 368].

A seizure without specifying the share is a seizure of the debtor's entire interest [*Suroof v. Ram Tobul*, 18 W. R. 106].

238 When a seizure of immovable property has been effected and made known and registered as in the last preceding section provided, any private alienation of the property seized, whether by sale, gift, mortgage, lease, or otherwise, after the seizure and before the removal of the same or the sale and conveyance of the property by the fiscal, shall be void as against all claims enforceable under the seizure.

Alienation by debtor subsequent to seizure void as against claims enforceable under seizure.

See notes to section 236.

239 If the amount decreed with costs and all charges and expenses resulting from the seizure of any property is paid into court, or if satisfaction of the decree is otherwise made through the court, or if the decree is set aside or reversed, an order shall be issued on the application of any person interested in the property, for the withdrawal of the seizure.

When seizure must be ordered to be withdrawn.

Same as section 275 of the Indian Code.

240 As soon as any property shall be seized by the fiscal, deputy fiscal, or other officer, a list of such property shall forthwith be made and signed by himself or the person seizing the same, and shall be given to the judgment-debtor and to any person claiming to be in possession of the property seized, and copies thereof shall be also deposited in the fiscal's office and annexed to the return to the writ.

List to be made of property seized.

Claims to Property seized.

Claims to property seized to be reported by fiscal and investigated by court.

241 In the event of any claim being preferred to, or objection offered against the seizure or sale of, any immovable or movable property which may have been seized in execution of a decree or under any order passed before decree, as not liable to be sold, the fiscal or deputy fiscal shall, as soon as the same is preferred or offered, as the case may be, report the same to the court which passed such decree or order; and the court shall thereupon proceed in a summary manner to investigate such claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects as if he were a party to the action.

Proviso.

Provided always that when any such claim or objection is preferred or offered in the case of any property so seized outside the local limits of the jurisdiction of the court which passed the decree or order under which such seizure is made, such report shall be made to, and such investigation shall thereupon be held by, the court of the district or division within the local limits of which such seizure was made, and the proceedings on such report and investigation with the order thereon shall, at the expiry of the appealable time, if no appeal has been within that time taken therefrom, but if an appeal has been taken, immediately upon the receipt by such court of the judgment or order in appeal, be forwarded by such court to the court which passed the decree or order, and shall be and become part of the record in the action. Provided, further, that in every such case the court to which such report is made shall be nearer to the place of seizure than, and of co-ordinate jurisdiction with, the court which passed the decree or order.

See paragraph 1 of section 278 of the Indian Code.

The inquiry under this section must be made with notice to all parties concerned, including the judgment-creditor and the

judgment-debtor. Where an inquiry is held without notice to the plaintiff, and an order for release of the property from seizure made, the District Judge may, upon application by the plaintiff, open up the proceedings and inquire into the claim anew in the presence of all parties [*Rangappa v. Kudadurege*, 2 C. L. R. 45].

Where a person makes a claim to property seized, and applies to have it investigated under this section, it is not competent to the court to refer him to a separate action [*Murugappa v. Samarasekera*, 1 N. L. R. 100].

When in an investigation under this section the court awards costs to the successful party, the order as to costs is not an appealable one [*Ramalingam v. Ragunatha*, 1 N. L. R. 355].

The order in a claim inquiry, being an order like a judgment, should contain a concise statement of the case, the points for determination, the decision, and the reasons. The claim or objection should be clearly defined, and the facts on which the decision is based clearly found [*Abdul Cader v. Annamalai*, 2 N. L. R. 166].

This section does not affect seizures under section 229 [see *Harila v. Abhesang*, I. L. R. 4 Bom. 323] nor can claims be preferred under it to property directed to be sold by a mortgage decree under section 201 [see *Deefholts v. Peters*, I. L. R. 14 Cal. 631 ; *Himatram v. Kushal*, I. L. R. 18 Bom. 98]. But where the property mortgaged, notwithstanding that a mortgage decree has been entered in the case, is seized by the Fiscal in ordinary course of execution, claims thereto may be preferred *Murugappa v. Samarasekera* [1 N. L. R. 100]. The section applies to claims which, if successful, would have the effect of releasing the property from attachment. Thus, it has been held in India that where the rights and interest of A in a certain *mehal* are attached, a claim by B to an undivided share in it should not be entertained [*Nito Kalee v. Kripanath*, 8 W. R. 358. See *Nga Tha v. Burn*, 11 W. R. (F. B.) 8].

But where property belongs to A and B jointly, and in execution of a decree against A anything more than A's right and interest in the property is attached, B has a right to come in and claim that the attachment may be removed, *quoad* his share [*Raj Kumar v. Kadambini*, 4 B. L. R. 175 ; *Khub Lall v. Ram Lochan*, I. L. R. 17 Cal. 260].

An assignee may apply to release the property of an insolvent debtor [*Kashi Prasad v. Miller*, I. L. R. 7 Alla. 752].

Where in execution of a decree for a debt due by a deceased person property in the hands of his representative is attached, a claim by the representative to have the property released on the ground that it is his own property does not, it has been held in India, fall within the section of the Indian Code corresponding

to the above, but within section 244 of the Indian Code—corresponding to section 344 of our Code—[*Wahed Ali v. Mussamat*, 18 W. R. 185; *Kuriyali v. Mayan*, I. L. R. 7 Mad. 255]; otherwise, if he objects as trustee of third parties not before the court [*Roop Lall v. Bekani*, I. L. R. 15 Cal. 437].

A judgment-creditor, it may here be mentioned, who attaches property which does not belong to the judgment-debtor commits a trespass, for which he is responsible in damages, even though he may have acted without malice and mistakenly [*Damodhar v. Lallu*, 8 Bom. 177; *Goma v. Gokaldas*, I. L. R. 3 Bom. 74].

Claim to be
made at
earliest
opportunity.

Proviso.

242 The claim or objection shall be made at the earliest opportunity, and if the property to which the claim or objection applies shall have been advertised for sale, the sale may (if it appears to the court necessary) be postponed for the purpose of making the investigation mentioned in section 241. Provided that no such investigation shall be made if it appears to the court that the making of the claim or objection was designedly and unnecessarily delayed with a view to obstruct the ends of justice.

This section corresponds to part 2 of section 278 of the Indian Code.

It is optional with a court to allow a claim or objection to be made when there has been intentional delay in making it. Where a court has refused or has neglected to adjudicate a claim, its order cannot act prejudicially to the claimant [*Roghoonath Doss v. Bhydonath*, 14 W. R. 364].

Claimant to
adduce
evidence.

243 The claimant or objector must on such investigation adduce evidence to show that at the date of the seizure he had some interest in, or was possessed of, the property seized.

Same as section 279 of the Indian Code.

The claimant should begin. The *onus* is on him to prove his claim that the goods or property attached belonged to him and were in his possession, and therefore not in that of the judgment-debtor. His evidence must be confined to his own claim, and not to establish the right of a third party [*Nga Tha v. Burn*, 2 B. L. R. 91].

When the question of possession is disposed of in favour of the claimant, the judge should not go into that of title [*Hamid v. Buktear*, I. L. R. 14 Cal. 617].

244 If upon the said investigation the court is satisfied that, for the reason stated in the claim or objection, such property was not, when seized, in the possession of the judgment-debtor or of some person in trust for him or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor, at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the court shall release the property wholly, or to such extent as it thinks fit, from seizure, and make such order as to payment of fees and charges already incurred by the fiscal as it may deem fit.

Discretion of court to release the property claimed ;

This section, with the exception of the last two lines, is the same as section 244 of the Indian Code.

The disallowance of a claim to property seized at the instance of one writ-holder is no bar to the same property being claimed by the same claimant when seized at the instance of another writ-holder holding a writ against the same debtor [*Gunewardene v. Natchiappa*, 1 S. C. R. 227].

An execution-creditor who did not authorize the Fiscal to seize under his writ certain property, which upon seizure was rightly claimed by a third party, cannot be condemned to pay the costs of the claim proceeding [*Ranesinghe v. Henry*, 1 N. L. R. 303 ; *Ramalingam v. Ragunatha*, 1 N. L. R. 355 ; 2 N. L. R. 14].

Where an inquiry is held and order made under this section in the absence of the execution-creditor, it is open to him to apply to the court to vacate such order and re-open the investigation [*Kiri Banda v. Assen*, 2 N. L. R. 27].

The order cannot and certainly ought not to contain any declaration of the claimant's title as against the judgment-debtor [*Bhyrab v. Meer Abdul*, 8 W. R. 93].

The only person against whom an order can be passed under this section is the decree-holder [*Surdhari Lal v. Ambica*, I. L. R. 15 Cal. 521]. If the claimant proves that the property attached was at the date of attachment wholly or partly his, an order should be passed releasing the property to that extent, and that is the only order which should be passed [*Jummal v. Tirbhee Lall*, 12 W. R. 41 ; *Khellat v. Gour Churn*, 18 W. R. 402].

Under this section the court cannot go beyond the question of possession and hold that a deed is invalid and the property had devolved on the judgment-debtor as heir [*Hamid v. Buktiar*, I. L. R. 14 Cal. 617; *Sheoraj v. Gopal*, I. L. R. 18 Cal. 290].

or to disallow
the claim.

245 If the court is satisfied that the property was, at the time it was seized, in possession of the judgment-debtor as his own property, and not on account of any other person, or was in the possession of some other person, in trust for him, or in the occupancy of a tenant or other person paying rent to him, the court shall disallow the claim.

Same as section 281 of the Indian Code.

The order of court allowing or disallowing a claim under this and the preceding section is not appealable [*De Silva v. Fernando*, 9 S. C. O. 134].

An order under this section disallowing a claim is conclusive against the claimant, not only as to possession, but as to title, unless an action under section 247 is instituted. Such order is equally conclusive against any subsequent transferee from the claimant, and is a bar to any action by such transferee for the recovery of the land. *Per* LAWRIE, J.—The order is conclusive only in respect of the particular seizure made, and as between the claimant and the purchaser under such seizure. If such seizure be released, the order will not estop the claimant from again asserting right against a new seizure [*Meenachy v. Guanaprabasam*, 2 C. L. R. 97].

Where an objection has been made and disallowed, it cannot be renewed by the same person in the same attachment [*Khelat v. Bhoggobutty*, 14 W. R. 144].

The contest is between the decree-holder and the claimant. The decree-holder does not represent the debtor so as to make the decision binding between the debtor and the claimant [*Shivapa v. Dod Nagaya*, I. L. R. 11 Bom. 114; *Kedur Nath v. Rakhal*, I. L. R. 15 Cal. 674. But see *Metritom v. Damoden*, 4 Mad. 472; *Guruva v. Subbarayudu*, I. L. R. 13 Mad. 367].

The claim may be disallowed where the claimant does not appear in support of his claim [*Tripoora Soonduree v. Ijjutoonissa*, 24 W. R. 411], or fails to produce any evidence [*Sreemuntoo v. Syud*, 21 W. R. 409], or fails to produce evidence worthy of credit [*Lalla Goondur v. Hubeeboonissa*, 15 W. R. 311]. In all these cases there is an adjudication and order against the claimant to entitle him to bring an action under section 247 [see *Kaminee Debia v. Issur Chunder*, 22 W. R. 39; *Sardhari v. Ambica*, I. L. R. 15 Cal. 521].

An order under this section enures to the benefit of the execution-creditor only, and cannot be set up by the judgment-debtor as a bar against the claimant [*Booloroonissa v. Kuveemoonissa*, 21 W. R. 230; *Gunga v. Haradhun*, 6 W. R. 157].

An order made in favour of one of several decree-holders does not enure for the benefit of other decree-holders who are not parties to the proceedings [*Badri v. Muhammed*, I. L. R. 18 Alla. 13].

246 If the court is satisfied that the property is subject to a mortgage or lien in favour of some person not in possession, and thinks fit to continue the sequestration or seizure, it may do so subject to such mortgage or lien.

Court may continue seizure notwithstanding mortgage.

Same as section 282 of the Indian Code.

In the case of a lien, the judgment-creditor must first satisfy the lien before he takes the property in execution [*Wijewardene v. Maitland*, 2 S. C. R. 90].

The court has power under this and the preceding two sections to make order as to payment of costs [*Candeperumal v. Sinnetai*, 1 N. L. R. 128].

This section is intended for the benefit of those whose liens or mortgages are not registered, and whose rights would be extinguished by a sale in execution, unless their existence and validity were acknowledged by the court [*Suppramanian v. Mohamado*, 3 N. L. R. 232].

If property is sold subject to a mortgage, and bought in by the mortgagee, the debt is satisfied if the value of the property is sufficient to cover the debt [*Dulichand v. Ram Kissan Singh*, I. L. R. 7 Cal. 648].

Where a mortgagee is in possession of the mortgage property when it is attached in execution of a decree against the mortgagor, he can claim to have the attachment withdrawn [*Kassirab v. Vithaldas*, 10 Bom. 100].

247 The party against whom an order under section 244, 245, or 246 is passed may institute an action within fourteen days from the date of such order to establish the right which he claims to the property in dispute, or to have the said property declared liable to be sold in execution of the decree in his favour: subject to the result of such action, if any, the order shall be conclusive.

Action by party claiming right.

The corresponding section in the Indian Code is section 283.

The institution of an action under this section by a party against whom an order under sections 244, 245, or 246 is passed does not entitle him to a stay of execution under the order pending the action [*Arunasalem v. Saray Lebbe*, 9 S. C. C. 179].

"Within fourteen days."—Sundays and public holidays are not excluded in reckoning this period [*Allapitchai v. Sinne Markar*, 9 S. C. C. 182]. And when the last day falls on a Sunday or public holiday, it is not open to the party entitled to bring the action under this section to institute it on the next working day [*De Silva v. Hendrick*, 1 S. C. R. 131. See *contra*, *Nallan v. Ossen*, 2 N. L. R. 381]. The day from which the period is to commence is excluded, and the last day of the period included [see *Wickramasooriya v. Appu Singho*, 1 N. L. R. 178]. Although no objection is taken by the defendant on the ground of the action being prescribed, the court may, *ex mero motu suo*, recognise the fact and dismiss the action [*Arunasalem v. Ramanathan*, 9 S. C. C. 190 ; 1 C. L. R. 77].

"The order shall be conclusive."—That is, as against such persons only as were parties to the claim inquiry, and not as against those who preferred no claim [*ibid*]. But see *Man Kuar v. Tara Sing* [I. L. R. 7 Alla. 583], where it was held that if a person whose property is attached does not claim, he cannot bring a regular suit to have it declared that the property belongs to him and not the judgment-debtor.

"The party against whom an order," &c.—The judgment-debtor on a writ comes within this expression [*Silva v. Silva*, 1 S. C. R. 124 ; 2 C. L. R. 50. See *contra*, *Silva v. Gunewardene*, 1 S. C. R. 321]. The only parties against whom an order under sections 244, 245, and 246 can be said to pass are the execution-creditor, the third party claiming or objecting and a mortgage or lien holder [*ibid*].

The allowance by a court of a claim to the property of one man by another gives no cause of action to the owner [*ibid*].

A party whose lands have been successfully claimed by another has an action at Common Law to have their separate rights determined [*ibid*].

A claimant who abandons his claim, and leaves the court without any evidence in support of it, may still, if the court make order disallowing his claim, institute an action under this section. But in such case the plaintiff, even if successful, should be condemned to pay the defendant's costs [*Silva v. Wijesinghe*, 1 S. C. R. 337 ; 2 C. L. R. 143].

Where property is claimed on behalf of a minor by a person who has not been appointed guardian, the minor, on the claim being disallowed, is not entitled to bring an action under this section [*Deen v. Pulle*, 2 S. C. R. 81 ; 3 C. L. R. 26]. Where,

however, a claim is made by a duly appointed "next friend," the minor is bound by the order on the claim inquiry and may institute an action under this section [*Omeru Lebbe v. Dias*, 3 S. C. R. 147].

A mortgagee, who is not in possession of the mortgaged property, has no right to claim it when seized under an unsecured creditor's writ, so as to prevent a sale thereof in execution; or, when his claim is disallowed, to bring an action under this section to have the property declared not liable to seizure, inasmuch as mortgaged property may always be seized and sold, subject to the mortgage, for the levy of a money judgment [see *Wijewardene v. Maitland*, 2 S. C. R. 90; 3 C. L. R. 7].

In an action under this section it must be averred in the plaint and proved that at the date of the institution of the action the decree was unsatisfied [*Perera v. Aberan*, 2 S. C. R. 119; 3 C. L. R. 24].

The heirs of a deceased judgment-creditor who have been substituted in the case in his place can, without taking administration to the estate of the deceased, maintain an action under this section against a successful claimant [*Weerakon v. Nikulas*, 2 C. L. R. 48].

An action under this section is not available to the holder of a mortgage decree against a successful claimant whose title, although derived from the mortgagor, is not subject to or affected by the mortgage decree. But in order to realise the mortgaged property in the hands of such claimant, the decree-holder must bring a distinct and separate hypothecary action as contemplated by the Roman-Dutch Law [*Moraes v. Andris*, 2 C. L. R. 191].

A person in possession of mortgaged property upon a title acquired under the mortgagor subsequently to the mortgage can rightfully claim the property when seized in execution under a mortgage decree, if he was not a party to the mortgage suit [*ibid*].

An action solely and exclusively under this section cannot be maintained unless instituted within fourteen days from the date of the order in the claim inquiry. A plaint under this section submitted within the fourteen days was rejected, and another plaint submitted after the fourteen days—*held*, that the action was prescribed: a plaint rejected and not put on the file of the court cannot be said to constitute the "institution" of an action [*Silva v. Dinekehamy*, 1 N. L. R. 19].

In an action under this section by an execution-creditor it is not competent to him to prove prescriptive possession on the part of his debtor of the property claimed [*Terumanse v. Menicke*, 1 N. L. R. 200].

A gifted a parcel of land to B, C, and D. On a writ by plaintiff against A the parcel of land was seized. B and C claimed it, and the claim was upheld. Plaintiff now sued A, B, C, and D under this section to have the order releasing the seizure set aside, and the deed of gift declared null and void on the ground of fraud and collusion—*held*, that A should not have been joined as a party, but that D was properly joined, and that the action was maintainable against B, C, and D [*Wickramatilaka v. Markar*, 2 N. L. R. 9].

It is not open to an execution-creditor to bring an action under this section within fourteen days of an order in a claim inquiry when a claim by the same person to the same property when seized under the same writ on a previous occasion had been disposed of in the claimant's favour, and no action thereupon had been brought by the creditor [*Kiri Banda v. Assen*, 2 N. L. R. 27].

The action under this section by an unsuccessful claimant need not necessarily be brought in the court which held the inquiry into the claim. If the value of the property seized does not exceed Rs. 300, the action should be brought in the Court of Requests, although the original action in which execution issued was in the District Court [*Abdul Cader v. Annamalai*, 2 N. L. R. 166].

The prayer in the plaint in an action under this section by the claimant should be for a declaration that he is entitled to have the property released from seizure, and for an order on the Fiscal to release the same accordingly. If the claimant proves that he was in possession of the property at the time of the seizure, he will be entitled to the declaration and order prayed for, unless the defendant counterclaims for a declaration that he is entitled to have the property seized and sold for payment of his judgment debt, and proves that his judgment-debtor is the owner of the property [*Abdul Cader v. Annamalai*, 2 N. L. R. 166].

In an action under this section by an unsuccessful writ-holder it is the value of the right which the plaintiff seeks to establish, and not the value of the land seized and claimed that is to decide the question of jurisdiction [*Mel v. Fernando*, 2 N. L. R. 225].

In the case of a plaint presented within time, but returned for amendment, and presented again duly amended after the fourteen days, the action cannot be said to be instituted too late [*Endoris v. Hamine*, 3 N. L. R. 97].

Where a claim of a mortgagee to land seized in execution was rejected and the land sold under the writ, *held*, that the order rejecting the claim did not affect the right of the mortgagee to sue on the mortgage or to seize the land mortgaged, into whose possession soever it went, and the mortgagee's action need not necessarily be brought within fourteen days as under this section [*Suppramanian v. Mohamado*, 3 N. L. R. 232].

If the claimant fails, he is not compelled to bring a declaratory suit to establish his title; he may prevent execution by paying the decretal amount, and then sue for it as money paid under compulsion [*Dulichand v. Ram Kishen*, I. L. R. 7 Cal. 648].

Where a claim is made and dismissed for default, a fresh claim may be preferred [*Mahadeb Mundul v. Modhoo*, 16 W. R. 59], but not where the claim has been struck off at the instance of the claimant [*Gooroo Dass v. Kamala Kant*, 20 W. R. 456].

Where an application was decreed with costs to be paid by the decree-holder, and the latter was declared in a subsequent suit entitled to sell the property, but no relief was asked in regard to the costs, it was held they could not be refunded by the court executing the decree [*Ragunath v. Badre*, I. L. R. 6 Alla. 21].

The effect of this section is to exclude a party to an investigation from any other remedy than that expressly provided for him by this section [*Settiappan v. Sarat Singh*, 3 Mad. 220].

The party against whom an order at an inquiry is passed must, if he sues, assert substantially the same right as that which was put forward at the inquiry [*Colvin, Cowie & Co. v. Elias*, 2 B. L. R. 212; 11 W. R. 40]. The decree-holder may sue to have his right to seize declared [*Mitchell v. Mathura Dass*, 12 Ind. App. 150], and a claimant may bring a declaratory suit to establish his right [*Narayanras v. Brother*, I. L. R. 4 Bom. 529], but the action should not be to set the order aside [*Kolesherri v. Kolasherri*, I. L. R. 4 Mad. 131].

In an action under this section the judgment in the claim inquiry is not admissible as evidence [*Kishori v. Hursook*, I. L. R. 12 Cal. 696 and 17 Cal. 436, p. 439].

When the same property is seized in execution of different decrees, and all the seizures are removed, it is not necessary for each seizing creditor to bring a separate suit. A decree obtained in a suit brought by one enures to the benefit of all [*Chintamomee v. Issur*, 12 W. R. 221].

It is the value of the property in dispute and not the amount of the decree which determines jurisdiction [*Durga Prasad v. Bachla*, I. L. R. 9 Alla. 140. But see *Annaji Ran v. Rama*, I. L. R. 10 Mad. 152; *Modhusudan v. Rakhal*, I. L. R. 15 Cal. 104].

A suit to set aside an order in a claim inquiry is not a step in aid of execution [*Raghuwandun v. Bhugoo Lal*, I. L. R. 17 Cal. 268].

Where a claim is disallowed, but the seizure subsequently released at the instance of one of the parties to the suit, the claimant is under no liability to bring his action under this section [*Gopal v. Bai*, I. L. R. 18 Bom. 241].

Where an unsuccessful claimant of movables seized in execution omits to apply for a postponement of the sale under section 242, and the sale is carried out, an action under this section is no longer open to him, and it is doubtful whether he can even maintain an action for damages outside the scope of this section [*James & Co. v. Natchiappen*, 3 N. L. R. 257].

If an unsuccessful claimant omit to institute an action under this section, he is for ever precluded from alleging that the property claimed was not liable to be sold under the seizure which necessitated the claim [*Ismail v. Omer Lebbe*, 3 N. L. R. 303].

Punishment as well as damages may be awarded for groundless claim.

248 Whenever it shall appear to a competent court, and be so found and declared in any judgment pronounced by it in any action instituted by or against any person claiming any property pointed out or seized in execution, that such claim is altogether groundless, and wilfully preferred only to defeat or delay the execution, every such claimant shall, in addition to his liability to pay costs and damages, be liable to a fine not exceeding fifty rupees, and such fine shall be recovered as a fine imposed by a court in a criminal case.

Seizure of partnership property for debt of partner, other partner may apply for release.

249 When a fiscal has seized property of a partnership, before or after its dissolution, upon a writ of execution against the interest therein of any partner made by virtue of an execution against his individual property, any other partner or former partner having an interest in the property may, at any time before the sale, apply to the court from which the writ of execution issued, upon an affidavit showing the facts, for an order directing the fiscal to release the property and to deliver it to the applicant.

Undertaking to be given by applicant.

250 Upon such an application the applicant must give an undertaking, with at least two sureties, approved by the judge, to the effect that he will account to the purchaser upon the sale to be made by virtue of the execution of the interest of the judgment-debtor in the property seized, in like manner as he would be bound to account to an assignee of such an interest; and that he will pay to the purchaser the balance

which may be found due upon the accounting, not exceeding a sum specified in the undertaking, which must be not less than the value of the interest of the judgment-debtor in the property seized by the fiscal as fixed by the judge.

251 Where property of a partnership has been released upon an undertaking as prescribed in the last two sections, if the execution by virtue of which the levy was made is set aside or is satisfied without a sale of the interest levied upon, the undertaking enures to the benefit of each judgment-creditor of the same judgment-debtor then having an execution in the hands of the fiscal having authority to levy upon that interest, as if it had been given to obtain a release from a seizure made by virtue of such an execution.

Undertaking, to whose benefit it enures.

252 Where property of a partnership has been so released, the interest of the judgment-debtor therein may be sold by the fiscal, and the purchaser upon the sale acquires all that interest as if he was an assignee thereof.

Interest of judgment-debtor may be sold.

Of the Sale and Disposition of the Property seized.

(A) *Of Sales Generally.*

253 If the property seized is coin or currency notes the fiscal shall deal with it in the manner hereinafter directed in respect of money received by the fiscal on the sale of property sold at the execution sale.

Property seized, when money, to be dealt with as proceeds of sale.

See section 277 of the Indian Code.

254 When the property seized is a decree of court the judgment-creditor at whose instance the seizure is made shall be deemed the assignee thereof under assignment as of the date of the seizure, made by the person against whom he is executing the writ of execution, so far as that person's interest extends, and he may realise the decree in the manner hereinafter provided for the execution of a decree by an assignee thereof.

When it is a decree of court, to be realised by judgment-creditor as assignee thereof.

In all other cases fiscal to sell.

Notice of sale: I.—For movable property.

255 In the case of all other property seized by the fiscal he shall proceed to the sale thereof in the manner following :

I.—In all cases of movable property the fiscal or deputy fiscal shall cause notice of sale thereof to be given by beat of tom-tom or in such other manner as to secure publicity thereto, both at the place of sale and also where the seizure shall have been made, and such notice shall not be less than three days and not exceeding fourteen days before the day of sale, unless the time be enlarged by any order of court, and shall specify, as fairly and accurately as under the circumstances is reasonably practicable—

- (a) The property to be sold ;
- (b) The action in which, and
- (c) The place, and
- (d) Day, and
- (e) Hour at which the sale is to take place ;
- (f) The amount of money for the levy of which the writ issued.

II.—For immovable property.

II.—In all cases of immovable property the like notice of sale shall be given as is hereinbefore required in sales of movable property, and the fiscal, deputy fiscal, or other officer shall also cause to be made four copies of the notice of sale in English and four in the native language prevailing within the district, one of each of which he shall cause to be posted at his office, at the court-house whence the execution issued, in some conspicuous part of the town or village in which the land is situate, and on some conspicuous spot on the property for sale, each of which publications shall be made ten days at the least before such sale takes place.

The sale of a mortgagee's rights under a mortgage, duly held and confirmed, is effectual to pass the mortgagee's rights to the auction purchaser, even though the attachment subsequent to which such sale is held may have been made under a wrong

section of the Code [*Sheo Charan v. Sheo Surak*, I. L. R. 18 Alla. 469. See also *Balder v. Ramchandra*, I. L. R. 19 Bom. 121 ; *Muniappa v. Subramaniya*, I. L. R. 18 Mad. 437].

256 Whenever the property seized under one writ shall exceed the value of one thousand rupees, the fiscal, deputy fiscal, or other officer shall, in addition to the notice hereinbefore required, advertise the sale thereof, enumerating briefly the goods for sale, the nature and situation of the land, and the time and place of the sale, in the *Government Gazette*; and no such sale shall take place until it shall have been so advertised once at least twenty days prior to the sale. It shall be lawful to the execution-creditor or debtor to require the publication of such sale to be made in any newspaper to be named by him; and all costs and charges attending such advertisements, particulars of which shall be always given by the fiscal with his return, shall be paid in advance by the party requiring such publication.

Advertise-
ment where
property
exceeds one
thousand
rupees in
value.

257 The fiscal, deputy fiscal, or other officer shall be also at liberty, at the request of both parties, or either of them, on payment to him by the applicant of all costs or expenses attending the publication, to advertise any sale of movable or immovable property in manner hereinbefore mentioned, although it does not exceed the value of one thousand rupees.

And in other
cases at cost
of party.

258 Every sale shall be held by an officer of the fiscal, or some other person duly authorised by the fiscal or deputy fiscal by writing under his hand. When the proceeds do not exceed the sum of seven thousand five hundred rupees, the fiscal or deputy fiscal shall recover a fee of three per cent. on the proceeds actually recovered on return thereof made to the court in respect of every sale and re-sale of movable property, and two per cent. on the proceeds of sale of immovable property belonging to the debtor. When the proceeds, whether

Proceedings
at the sale.

of movable or immovable property, exceed that sum, the fiscal or deputy fiscal shall recover a fee of one hundred and fifty rupees, and of five rupees for every thousand rupees of the proceeds over and above the said sum of seven thousand five hundred rupees. And in every case after the seizure of property and publication of sale thereof, in which the sale shall be postponed or stayed at the request or with the concurrence of the party suing out the writ, the fiscal or deputy fiscal shall recover half of the above fees on the estimated value of such property from the party at whose instance the writ shall be stayed, and in default of immediate payment thereof the fiscal shall certify the amount of such fees to the court whence the execution issued. Provided, however, that such fee shall never exceed fifty rupees or the actual expenditure already incurred by the fiscal towards carrying out the sale, whichever sum shall be the largest. The fees recovered under this section shall be brought to account and appropriated in such manner as the Governor, with the advice of the Executive Council, shall from time to time direct.

Proviso.

Court may in certain cases postpone sale.

259 If at any time prior to the sale of immovable property seized in execution the judgment-debtor can satisfy the court that there is reason to believe that the amount of the decree and of any unsatisfied judgment then in force against him may be raised by mortgage, or lease, or private sale of such property, or some part thereof, or of any other immovable property of the judgment-debtor, the court may on his application postpone the sale of such property for such period as it thinks proper to enable him to raise the amount, and shall make such order as to the payment of fees and charges due to the fiscal as it may deem fit.

In such case the court shall grant a certificate to the judgment-debtor, authorising him, within a period

to be mentioned therein, and notwithstanding anything contained in section 238, to make the proposed mortgage, lease, or sale. Provided that all moneys payable under such mortgage, lease, or sale shall be paid into court and not to the judgment-debtor. Provided also that no mortgage, lease, or sale under this section shall become absolute until it has been confirmed by the court.

The section corresponding to this in the Indian Code is section 305.

Postponement of a sale under this section is a matter of discretion [*Bishnumun v. Land Mortgage Bank*, 12 Ind. App. 7, p. 10]. But the courts should exercise a reasonable discretion, and should not postpone the sale unless the judgment-debtor can make out a fair case [*Kishen Coomaree v. Golab*, 15 W. R. 193; *Mohinee Mohun v. Ram Kant*, 15 W. R. 322].

260 On every sale of immovable property under this chapter the person declared to be the purchaser shall pay, immediately after such declaration, in every case where the price does not exceed one hundred rupees, the full amount of, but in every other case a deposit of twenty-five per cent. on the amount of, his purchase money to the officer conducting the sale, and in default of such deposit the property shall forthwith be put up again for sale.

Deposit by
purchaser.

The corresponding section in the Indian Code is section 306.

An officer conducting a second sale is not bound to commence from the next highest bid below that made by the defaulter. He may do so if the next highest bidder is willing to abide by his bid. Otherwise he should commence the sale *de novo* [*Gour Mookh v. Lalla Gour*, 1 W. R. Mis. 11].

The officer conducting a sale cannot insist upon a deposit being made before acceptance of a bid, but if it appear that persons without means have been put forward to make sham biddings and fraudulently frustrate the sale, he would be justified in inquiring into the trustworthiness of the bidder before accepting his bid [*Muhesh Narain v. Kishamund*, 9 Moore, 328]; and the sham bidder would be liable under section 223 of the Penal Code for obstructing the sale [*Mohesh Chunder, Appellant*, W. R. 1864, Mis. 3].

Non-compliance with the provisions of this section voids the sale [*Intizam Ali v. Narain Singh*, I. L. R. 5 Alla. 316]. It is a material irregularity [*Bhim v. Sarwan*, I. L. R. 16 Cal. 33. But see *Vekata v. Sama*, I. L. R. 14 Mad. 227].

Payment in
fall.

261 Where the price exceeds one hundred rupees the balance amount of the purchase money shall be paid by the purchaser on or before the thirtieth day after the sale of the property, or if the thirtieth day be a Sunday or public holiday, then on the first office day after the thirtieth day.

See section 307 of the Indian Code.

Default in
payment,
consequence
of.

262 In default of payment within the period mentioned in the last preceding section, the deposit after defraying the expenses of the sale shall be forfeited to, and shall go in reduction of the claim of, the judgment-creditor, and the property shall be resold, and the defaulting purchaser shall forfeit all claim to the property and to any part of the sum for which it may subsequently be sold.

See section 308 of the Indian Code.

Fresh
notification
on resale.

263 Every resale of immovable property in default of payment of the purchase money within the period allowed for such payment shall be made after the issue of a fresh notification in the manner and for the period hereinbefore prescribed for the sale.

Same as section 309 of the Indian Code.

Bid by a
co-sharer.

264 When the property sold in execution of a decree is a share of undivided immovable property, and two or more persons, of whom one is a co-sharer, respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding of such co-sharer.

Same as section 310 of the Indian Code.

There must be a distinct bid by the co-sharer in the ordinary way. It is not sufficient that he prefers his right of pre-emption or offers to pay a sum equal to that bid by the highest bidder [*Hira v. Unas*, I. L. R. 5 Alla. 827; *Tej Singh v. Gobind*, I. L. R. 2 Alla. 850].

265 The fiscal or other officer conducting any sale of immovable property under this chapter may, before accepting any bid at such sale, satisfy himself as to the *bonâ fides* of the bidder and his ability to pay down the amount of deposit required : and in the event of his not being so satisfied may refuse to accept any such bid, and shall continue the sale as if no such bid had been made.

Fiscal may require payment of deposit.

266 The second sale, taking place in consequence of such non-payment of balance of purchase money, shall be made in the manner hereinbefore prescribed for the first sale, and if the amount of the purchase money for which the property is sold at such second sale shall fall short of the amount for which the first sale was concluded, then the first purchaser and his sureties, if any, shall be held liable to pay the fiscal the amount of this difference, and the fiscal on non-payment thereof by such purchaser and his sureties within one week after demand made by him upon them respectively in writing, shall certify the amount of the said difference to the court whence the execution issued. And the like course shall be observed in respect of any subsequent sale rendered necessary by failure in payment of the purchase amount.

Deficiency on such resale to be paid by first purchaser on fiscal's certificate.

See section 293 of the Indian Code.

Under the corresponding section of the Indian Code (section 293) it has been held that the fact that the certificate provided for has not been granted will not prevent the decree-holder or the judgment-debtor, as the case may be, from recovering from the defaulter the deficiency arising on a re-sale of property sold in execution of a decree, but not paid for [*Tapesri v. Deoki Nandan*, I. L. R. 19 Alla. 22. See section 270].

267 If at the sale of immovable property the highest bidder on being declared the purchaser shall not forthwith pay down the amount of deposit required, and give good and sufficient security to the satisfaction of the fiscal, deputy fiscal, or other officer for the payment

On highest bidder not making deposit, next highest may be declared purchaser ;

difference to
be paid by
highest
bidder on
fiscal's
certificate.

of the residue, the next highest bidder may be thereupon declared the purchaser, and required to make such deposit and security as aforesaid; and in the same manner the other bidders in rotation; and each person failing to make such deposit and to give security as aforesaid may be held liable to pay the difference between the amount of his offer and the sum finally settled at the sale, and the fiscal, on non-payment thereof by such persons respectively within one week after demand made by him upon them in writing, shall certify the amount of the said difference in each case to the court whence the execution issued. Provided, however, that in case of default of the highest bidder, instead of declaring the next highest bidder purchaser, the officer holding the sale may forthwith put up the property for sale anew, or adjourn the sale, in which latter case the property shall again be advertised as before.

Forfeiture of
deposit.

268 If the price for which the property is finally sold at the second or any subsequent sale is not less than that of the first sale, then the money deposited by the purchaser at the first and other sales which preceded the final sale shall be paid to the execution-creditor in satisfaction *pro tanto* of the judgment: and in the event of such judgment being so satisfied, and any surplus remaining, such surplus shall, after deducting any expenses consequent on the sale, be paid to the judgment-debtor.

Differences
realised to
augment the
purchase
money.

269 The differences between the biddings of any persons failing to make the deposit and give the security required by section 267 and the sum finally settled at any such sale and between the amount of the final sale and those of previous sales shall, when realised, be paid by the fiscal into the government agent's or assistant government agent's office in augmentation of the purchase money of the final sale.

270 The amount certified by the fiscal to be payable to him for half fees under the provisions of section 258 and the amounts of the differences certified by the fiscal and directed to be reported to the court by sections 266 and 267 shall, in the case of such half fees at the instance of the fiscal and in the case of such differences respectively at the instance either of the fiscal, or of the judgment-creditor, or of the judgment-debtor, be recoverable from the persons declared in those sections to be liable to pay the same, in the same way as if the certificate were a decree for money passed by the court to which it is returned against those persons; and the cost (to be fixed by the court) of any notice, publication, or proclamation required under any of the provisions of this Ordinance to be given or made by the fiscal by beat of tom-tom or in any other manner whatsoever, shall, in every instance where provision for the payment thereof is not otherwise specially made, be prepaid by the person at whose instance or in whose interest the same is required.

The amount of fiscal's certificates to be recovered as by execution of decree.

Costs of notice, publication, or proclamation.

271 No officer having any duty to perform in connection with any sale under this chapter shall either by himself or another bid for, acquire, or attempt to acquire any interest in any property sold at such sale.

No officer conducting sale to bid.

Same as section 292 of the Indian Code.

272 A holder of a decree in execution of which property is sold may, with the previous sanction of and subject to such terms as to credit being given him by the fiscal and otherwise as may be imposed by the court, bid for or purchase the property.

Holder of decree may bid or purchase.

When a decree-holder purchases, the purchase money and the amount due on the decree may, if the court thinks fit, be set off against one another, and the court in execution of whose decree the sale is made may enter up satisfaction of the decree in whole or in part accordingly.

And purchase money may be set off against decree.

Place of
sale of
immovable
property.

273 In all cases the sale of immovable property shall be conducted on the spot, unless the court shall otherwise direct, or unless on application in writing to the fiscal or his deputy the parties shall consent to its being conducted elsewhere.

(B) *Sales of Movable Property.*

Sale of a
share in any
public
company.

274 If the property to be sold is a negotiable instrument or a share in any public company or corporation, the court may direct the fiscal, instead of selling it by public auction, to make the sale of such instrument or share through a broker at the market rate of the day.

Same as section 296 of the Indian Code.

Of other
movable
property.

275 In the case of other movable property the price shall be paid at the time of sale, and in default of payment the property shall forthwith be again put up for sale.

On payment of the purchase money the officer holding the sale shall grant a receipt for the same, and the sale shall become absolute.

See section 297 of the Indian Code.

On payment of the purchase money the sale of movables becomes absolute, and no irregularity will vitiate it, though a suit will lie to set it aside if there is a warranty of title [*Framji v. Hormusji*, I. L. R. 2 Bom. 258, 266]. Under the latter part of section 276 of our Code the sale may be impeached.

If the movable property of A is sold in execution of a decree against B, A can follow the property in the hands of the purchaser, or sue him for damages equal in amount to the value of the property, for the latter only purchased the right, title, and interest of B [*Mahanund v. Akial*, 9 W. R. 118].

What may
vitiate sale.

276 No irregularity in publishing or conducting the sale of movable property shall vitiate the sale unless substantial damage has been caused to the person impeaching the sale thereby.

See section 298 of the Indian Code.

277 When the property sold is a negotiable instrument or other movable property of which actual seizure has been made, the property shall be delivered to the purchaser.

Delivery to purchaser.

Same as section 299 of the Indian Code.

278 When the property sold is any movable property to which the judgment-debtor is entitled, subject to a right of possession of some other person, the delivery thereof to the purchaser shall be made by giving notice to the person in possession prohibiting him from delivering possession of the property to any person except the purchaser.

Delivery where third party is in possession.

Same as section 300 of the Indian Code.

279 When the property sold is a debt not secured by a negotiable instrument, or is a share in any public company or corporation, the assignment thereof shall be made by a certificate of sale in favour of the purchaser signed by the fiscal, who shall forthwith, by a written notice, prohibit the creditor from receiving the debt or any interest thereon, and the debtor from making payment thereof to any person except the purchaser, or the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon, and the manager, secretary, or other proper officer of the company from permitting any such transfer or making any such payment to any person except the purchaser.

Delivery of unsecured debt or share.

Same as section 301 of the Indian Code.

280 If the endorsement or conveyance of the party in whose name a negotiable instrument or a share in any public company or corporation is standing is required to transfer such instrument or share, the judge may endorse the instrument or the certificate of the share, or may execute such other document as may be necessary.

Endorsement of negotiable instrument or share.

The endorsement or execution shall be in the following form or to the like effect :

“ *A. B. by C. D., judge of the district court of — (or as the case may be), in an action by E. F. against A. B.*”

Until the transfer of such instrument or share the court may, by order, appoint some person to receive any interest or dividend due thereon, and to sign a receipt for the same ; and any endorsement made, or document executed, or receipt signed as aforesaid, shall be as valid and effectual for all purposes as if the same had been made, or executed, or signed by the party himself.

Same as section 302 of the Indian Code.

Power of
court to make
vesting order.

281 In the case of any movable property not hereinbefore provided for, the court may make an order and execute such document as may be necessary vesting such property in the purchaser, or as he may direct ; and such property shall vest accordingly.

Same as section 303 of the Indian Code.

(C) *Sales of Immovable Property.*

Sale not
absolute
until after
thirty days
and
confirmation
by court ;

282 The fiscal shall report to the court every sale of immovable property made by him or under his direction within ten days after the same shall have been made. And no sale of immovable property shall become absolute until thirty days have elapsed subsequent to the receipt of such report, and until such sale has been confirmed by the court.

and may be
set aside for
material
irregularity.

The decree-holder, or any person whose immovable property has been sold under this chapter, or any person establishing to the satisfaction of the court an interest in such property, may apply by petition to the court to set aside the sale on the ground of a material irregularity in publishing or conducting it ; but no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the court that

he has sustained substantial injury by reason of such irregularity, and unless the grounds of the irregularity shall have been notified to the court within thirty days of the receipt of the fiscal's report.

In every such application the purchaser shall be made respondent to the petition.

See section 311 of the Indian Code.

"An interest in such property," &c.—Every judgment-creditor who has applied for execution of a decree against the same judgment-debtor, and has not obtained satisfaction, has an interest in the property of his debtor sold under another writ. Hence a judgment-creditor is entitled to have a sale of the property of his debtor which has taken place under a writ issued at the instance of another judgment-creditor set aside on the ground of material irregularity [*Chetty v. Pulle*, 3 S. C. R. 41 : *Komerappa v. Muttiah*, 3 C. L. R. 58].

To entitle a party to set aside, under this section, a Fiscal's sale on the ground of material irregularity, it must be shown that the substantial injury alleged to have been sustained arose directly from the irregularity complained of [*Ameresekere v. Kirimenika*, 3 C. L. R. 30].

The fact of a decree-holder bidding and purchasing at an execution sale without the previous sanction of the court under section 272 is not a material irregularity in the publishing or conducting of the sale within the meaning of this section [*Silva v. Uparis*, 3 C. L. R. 75].

When a person, a stranger to the proceedings, purchases property *bonâ fide* at an auction sale held in execution of a decree, the sale to him cannot be set aside on the ground that the decree had already been satisfied out of the court at the time the sale was held [*Yellappa v. Ramchandra*, I. L. R. 21 Bom. 463].

A judgment-debtor cannot have a court sale set aside on the ground of fraud in the absence of proof that the auction purchaser was a party to the fraud, and that the fraud came to the judgment-debtor's knowledge subsequent to the confirmation of the sale [*Abubaker v. Mohidin*, I. L. R. 20 Mad. 10].

It is not sufficient for an applicant under this section to show that there has been material irregularity in publishing or conducting a sale, and that a price below the market value has been realised, but he must go on to connect the one with the other, that is, the loss with the irregularity as effect and cause by means of direct evidence [*Jagan Nath v. Makund Prasad*, I. L. R. 18 Alla. 37. See also *Shirim Begam v. Agha Ali Khan*, I. L. R. 18 Alla. 141].

Where a debtor's property under attachment had been ordered to be sold at a fixed date after the disposal of a certain claim thereto, but no hour had been fixed for the sale, and the property was sold at a very inadequate price by reason of the paucity of bidders, *held*, that there had been material irregularity causing substantial injury to the debtor, and that it is sufficient, if the evidence, though not direct, shows that the injury was a necessary result of the irregularity complained of [*Surno Moyee Debi v. Dakina Ranjan*, I. L. R. 24 Cal. 291].

Where a material irregularity is proved to have occurred in the conduct of a court sale, and it is shown that the price realised is much below the true value, it may ordinarily be inferred that the low price was a consequence of the irregularity, even though the manner in which the irregularity produced the low price be not definitely made out [*Venkata Subbraya v. Zamindar of Karvetinagar*, I. L. R. 20 Mad. 159].

No application can be made under this section by a purchaser not a party after the sale has been confirmed under section 283 even on the ground of fraud [*Gobind v. Unra Churn*, I. L. R. 14 Cal. 679]. His only remedy is a regular suit [*Luchmeput v. Adoyto Churn*, 24 W. R. 452].

When a payment is received after the thirty days mentioned in section 261, the irregularity, it would appear, does not fall within this section [see *Brinda Debee v. Gopee Soonduree*, 6 W. R. Mis. 82].

Does irregularity in publishing the notice of attachment fall within this section? [*Macnaghten v. Mahabir*, I. L. R. 9 Cal. 656, p. 660.]

All irregularities are cured by the certificate of sale, and after that no outsider can object that the sale does not pass a good title [*Balkrishna v. Masuma Bibi*, I. L. R. 15 Alla. 142; *Naigar v. Bhaskar*, I. L. R. 10 Bom. 444].

If a judgment-debtor lies by and knowing of an irregularity allows the sale to proceed without objection, he should not be allowed to raise the same point afterwards [*Arunachellam v. Arunachellam*, 15 Ind. App. 171; I. L. R. 12 Mad. 19].

When a sale is set aside on the ground of irregularity the seizure revives [*Gunno Singh v. Muddum Mohan*, W. R. Sp. No. 26].

A sale regularly conducted under a subsisting decree does not become null and void on the decree being afterwards re-opened, set aside, and reversed. [*Idroos Lebhe v. Meera Lebhe*, 1 Tamb. Rep. 6].

Order
confirming
the sale.

283 If no such application as is mentioned in the last preceding section is made within the thirty days, or if such application is made and the objection disallowed,

the court shall at any time after the expiration of the thirty days, on the application of the decree-holder or of the purchaser, pass an order confirming the sale as regards the parties to the suit and the purchaser. Provided that no order confirming the sale shall be made if it appear to the court that the judgment-debt was satisfied at the time that the writ of execution issued. Proviso.

If such application is made, and if the objection is allowed, the court shall pass an order setting aside the sale. Order setting aside the sale.

The section in the Indian Code corresponding to this is section 312.

It is only sales held after the Code came into operation that require confirmation. So, in the case of a sale held in 1871 under Ordinance No. 4 of 1867, where no objection had been taken within thirty days, *held*, that it was competent to the Fiscal to pass a conveyance to the purchaser in 1893. Where the purchaser was not the execution-creditor an express order of court to convey was not necessary [*Gabriel v. Pelis*, 1 N. L. R. 6].

A court has no power to confirm a sale after the decree on which execution proceeded is set aside [*Idroos Lebbe v. Meera Lebbe*, 1 Tamb. Rep. 6].

A regular suit will lie to set aside the whole sale although confirmed by court for any other cause than that it has been irregularly conducted, such as that the property sold is outside the jurisdiction of the court [*Nowab Ali v. Uzir Mohamed*, 23 W. R. 233; *Prem Chand v. Mokhoda*, I. L. R. 17 Cal. 699; *Jammal Ali v. Tirbhee*, 12 W. R. 41; *Hormusji v. Cowasji*, I. L. R. 13 Bom. 297].

It is not sufficient to set aside a sale that the decree has subsequently been set aside on appeal [*Beharee Lall v. Rajah*, 6 Alla. 291], unless it has been set aside before the sale has been confirmed [*Basappa v. Dundaya*, I. L. R. 2 Bom. 540]. But if the judgment-creditor is the purchaser, he purchases subject to the result of the litigation [*Sadasivayyar v. Muttu Subapathi*, I. L. R. 5 Mad. 106].

284 The purchaser at any such sale may apply to the court by petition on summary procedure to set aside the sale, on the ground that the person whose property purported to be sold had no saleable interest therein, When purchaser may apply to set aside sale.

and the court may, on such application, make such order as it thinks fit; provided that both the judgment-debtor and the decree-holder are made respondents to the petition.

This section is substantially the same as section 313 of the Indian Code.

A purchaser may also sue, and even follow his money in the hands of, a person who has got it under section 352 [see *Kishun v. Muhammed*, I. L. R. 13 Alla. 383].

The decree-holder is liable for damages on account of the wrongful execution [*Kanaye Bose v. Hur Chund*, 14 W. R. 120].

A saleable interest in a portion of the property is sufficient [*Ram Coomar v. Shoshee*, I. L. R. 9 Cal. 626].

If the purchaser knew that the debtor had no saleable interest in the property, the sale should not be set aside [*Mahabir v. Dhumand*, I. L. R. 3 Alla. 527].

Application must be made on notice to the judgment-debtor or, if dead, on notice to his representative [*Bala Kadar v. Gulam Mohidin*, I. L. R. 7 Bom. 424].

and get back
his purchase
money.

285 When a sale of immovable property is set aside under sections 282, 283, or 284, when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, and the purchaser is for that reason deprived of it, the purchaser shall be entitled to receive back his purchase money from any person to whom the purchase money has been paid.

An order for the repayment of the said purchase money may be made by the court on any application under sections 282, 283, or 284, provided that the person against whom the order is directed is party thereto, and such order may be enforced against such person under the rules provided by this Ordinance for the execution of a decree for money.

This section is substantially the same as section 315 of the Indian Code.

"From any person to whom the purchase money has been paid."—This supposes that the purchase money may be paid out before the confirmation of sale [*Jogendro Nath v. Govind*, I. L. R. 12 Cal. 252].

The purchaser is not to be charged with the expenses of the sale [*Hurdi v. Surjoo*, 6 Alla. 309]. He should be allowed the money laid out by him for the benefit of the property, but he must account for the rents and profits [*Morgan v. Abdul*, 23 W. R. 393].

286 If the court shall have confirmed the sale, and the purchaser shall have paid the full amount of the purchase money according to the conditions of sale, and shall have supplied the fiscal or deputy fiscal with stamps of the proper amount required by law for the conveyance of the land sold to him (which stamps he shall be bound to supply when he pays the purchase money in full), and if the sale was not effected in execution of a decree specifically directing the sale, then the fiscal or deputy fiscal shall forthwith make out and execute a conveyance in duplicate of the property according to the form No. 56 in the second schedule hereunto annexed or such other form, or expressed in such terms, as the court may deem expedient, which conveyance shall be binding and of force, though not executed before a notary public. The fiscal or deputy fiscal shall deliver the original to the purchaser and transmit the duplicate to the registrar of lands for the district in which the land is situate, in like manner as now is or shall be required to be done by notaries in respect of deeds executed before them; and the fiscal or deputy fiscal shall be entitled to recover for such conveyance, when the amount of purchase shall be under thirty rupees, a fee of fifty cents; when it shall exceed thirty rupees, a fee of one rupee; when it shall exceed one hundred rupees, a fee of one rupee and fifty cents; when it shall exceed two hundred rupees, a fee of two rupees and fifty cents; and when it shall exceed five hundred rupees, a fee of three rupees and seventy-five cents, and no more; and such fee shall be brought to account and appropriated in such manner as the Governor shall direct.

Conveyance
to purchaser ;

But if the sale was effected in execution of a decree specifically directing the sale, then the conveyance shall be made in conformity with the directions of the court contained in the decree.

to contain
sufficient
map of the
premises.

Provided, however, that to all conveyances made by the fiscal to complete a sale effected in execution of a decree of court, in the event of there being no diagram or map of the premises which are the subject of the conveyance already appended to a title deed thereof delivered to the purchaser, there shall be annexed a sufficient map exhibiting, when possible, some permanent physical feature of the ground; and the purchaser shall pay in advance the expense of preparing it in addition to the fee prescribed for the conveyance. Such diagram or map shall be prepared by a competent surveyor licensed by the fiscal for that purpose, and such surveyor shall be an officer of the fiscal within the meaning of section 325.

See section 316 of the Indian Code.

Where land had been sold in execution to a plaintiff, since deceased, and he had omitted to take the Fiscal's conveyance, his heirs, in order to obtain such conveyance after the lapse of some years, need not have themselves substituted plaintiffs: the court might on summary petition by them authorise or order the Fiscal to grant such conveyance [*Jaldin v. Nurma*, 1 S. C. R. 187].

A purchaser has no vested interest in the property before the date of the certificate. He could not insist on the sale being confirmed and a certificate being given him if the amount due by the judgment-debtor be paid in before that date [*Girish Chundra v. Apurba* I. L. R. 21 Cal. 940].

A purchaser without a conveyance has an equitable interest in the property which, when perfected by the conveyance, was superior to that of any subsequent purchaser at a private sale or in execution of a decree [*Yeshwant v. Govind*, I. L. R. 10 Bom. 453; *Chintamanrav v. Vithabai*, I. L. R. 11 Bom. 588], unless the first purchaser was guilty of negligence and perfected his title after the second purchaser had been put in possession [*Nanjudepa v. Hemapa*, I. L. R. 9 Bom. 10].

If in a suit the sale is admitted, no certificate is necessary [*Doorga Narain v. Baney*, I. L. R. 7 Cal. 199, p. 207].

All irregularities previous to sale are cured by the issue of a certificate [*Balkrishna v. Masuma*, I. L. R. 5 Alla. 142].

287 When the property sold is in the occupancy of the judgment-debtor or of some person on his behalf, or of some person claiming under a title created by the judgment-debtor subsequently to the seizure of such property, and a conveyance in respect thereof has been made to the purchaser under section 286, the court shall, on application by the purchaser, order delivery to be made by putting the purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person bound by the decree who refuses to vacate the same.

Court may order delivery of possession to purchaser.

An order for delivery of possession made under this section may be enforced as an order falling under head (C) section 217, the purchaser being considered as judgment-creditor.

Order how to be enforced.

This section is substantially the same as section 318 of the Indian Code.

If a purchaser has been once put properly in possession, he cannot take out a second execution [*Lakshmana v. Narasinhamsami*, I. L. R. 7 Mad. 167]; and if he is subsequently dispossessed, his only remedy is a regular suit [*Gopal Dass v. Than Singh*, I. L. R. 4 Alla. 184].

The remedy under this section is additional, not exclusive [*Kishori Mohun v. Chunder Nath*, I. L. R. 14 Cal. 644].

An order for delivery of possession under this section made *ex parte* and unsupported by any evidence is irregular, and is not a good foundation for proceedings under section 325 and the following sections [*Abeyedere v. Markar*, 2 N. L. R. 19].

If the person in possession of property sold in execution declines to deliver possession, the court may make an order under this section for delivery of possession, provided that such person is the judgment-debtor or a person claiming under him or holding on his behalf; but if such person claims the property by an independent title, the court will leave the purchaser to the remedy of an action *rei vindicatio* [*ibid*].

Semble, that all that clause 2 of this section means is that in executing an order for delivery of possession of premises to a purchaser in execution, the Fiscal may break open doors and

use force to expel persons found on the premises, as he may in the execution of a writ of possession [*ibid*].

Resistance or obstruction to delivery of possession ordered by the District Court under this section is not an offence that could be summarily dealt with by that court under sections 325 and 326. Such resistance or obstruction could be dealt with more rapidly in the Police Court under section 185 of the Penal Code [*De Silva v. De Silva*, 3 N. L. R. 161].

Mode of
delivery
where
property is in
occupancy of
person
entitled
to occupy.

288 When the property sold is in the occupancy of a tenant or other person entitled to occupy the same, and a conveyance in respect thereof has been made to the purchaser under section 286, the court shall order delivery thereof to be made by affixing a notice of the sale having taken place, both in English and in the native language or languages prevailing within the district, in some conspicuous place on the property, and proclaiming to the occupant by beat of tom-tom, or in such other mode as may be customary, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser, and the cost (to be fixed by the court) of such proclamation shall in every case be prepaid by the purchaser.

Substantially the same as section 319 of the Indian Code.

A person may get possession, if he can, without the aid of the court [*Obhoya v. Rajendro*, 22 W. R. 406].

Even before the enactment of the Code a Fiscal's conveyance had relation back to the date of the execution sale, and therefore enured to the benefit of a party to whom the execution-purchaser had conveyed before obtaining the Fiscal's conveyance [*Abubaker v. Kalu Etena*, 9 S. C. C. 32; *Kadirawelupulle v. Pina*, 9 S. C. C. 36; *Silva v. Tissera*, 9 S. C. C. 92; *Selohamy v. Raphael*, 1 S. C. R. 73].

The expressions "right and title" and "legal estate" used in this section are synonymous [*Silva v. Hendrick*, 1 N. L. R. 13].

Right and
title of
judgment-
debtor not
divested by
sale till
confirmation
and
execution of

289 The right and title of the judgment-debtor or of any person holding under him or deriving title through him to immovable property sold by virtue of an execution is not divested by the sale until the confirmation of the sale by the court and the execution of the fiscal's conveyance. But if the sale is confirmed

by the court and the conveyance is executed in pursuance of the sale, the grantee in the conveyance is deemed to have been vested with the legal estate from the time of the sale.

fiscal's
conveyance.

290 The fiscal, on the day of the sale, or at any time thereafter until the confirmation of the sale by the court and the execution of the fiscal's conveyance, may at his discretion, and if provided with the necessary funds therefor by the purchaser or by the judgment-creditor, or debtor, himself or by his agent duly authorised in writing enter into possession of the immovable property sold by virtue of the execution, and retain possession of the same until the confirmation of the sale by the court and the execution of the conveyance in pursuance thereof.

Fiscal may
enter.

291 The person in possession of immovable property sold by virtue of an execution may, until the confirmation of the sale by the court and the execution of the fiscal's conveyance, use and enjoy the same as follows, without being chargeable with committing waste :

Person in
possession
may use and
enjoy until
confirmation.

- (1) He may use it and enjoy it in like manner and for the like purposes as it was used and enjoyed before the sale, doing no permanent injury to the property.
- (2) He may make the necessary repairs to a building or other erection thereupon. But this provision does not permit an alteration in the form or structure of the building or other erection.
- (3) He may use and improve the land in the ordinary course of husbandry, and may collect, gather, harvest, and store the crops and produce thereof, but shall not be entitled to them.
- (4) He may apply any wood or timber on the land to the necessary reparation of a fence, building, or other erection which was thereupon at the time of the sale.

On
confirmation
and
execution of
conveyance,
fiscal to
deliver
possession to
grantee.

292 On the sale being confirmed by the court and the conveyance executed in pursuance of the sale, the fiscal or person in possession of the immovable property sold shall forthwith give possession of the same, together with all the crops and produce (if any) collected, gathered, harvested, and stored subsequent to the sale, to the grantee in the conveyance; and if the sale is not confirmed, the fiscal or his agent shall forthwith, if in possession, restore the judgment-debtor or any person holding under him to possession of the immovable property together with all the crops and produce (if any) collected, gathered, harvested, and stored whilst the fiscal or his agent was in possession.

The duty of the Fiscal under this section would arise only if he were in possession under section 290, and the duty of the other person in possession, if he were the judgment-debtor or some person claiming under him by a title created subsequently to the seizure, or were holding on behalf of the judgment-debtor or such person [*Abeyedere v. Markar*, 2 N. L. R. 19].

Judgment-
debtor may
be restrained
from waste.

293 If at any time before the execution of the fiscal's conveyance the judgment-debtor, or any other person in possession of the property sold, commits, or threatens to commit, or makes preparations for committing waste thereupon, the court from which execution issued may, upon the application of the purchaser or his agent or attorney, and proof by affidavit of the facts, grant, without notice, an order restraining the wrongdoer from committing waste upon the property.

Punishment
for
committing
waste.

294 If the person against whom such an order is granted commits waste in violation thereof after the service upon him of the order, the court, upon proof by affidavit of the facts, may grant an order requiring him to show cause at a time and place therein specified why he should not be punished for a contempt.

295 If upon the return of the order to show cause it satisfactorily appears that the person required to show cause has violated the former order, the court may punish him in manner provided by law for the punishment of contempts of court.

And for
disobeying
order.

Moneys paid to, and realised by, the Fiscal.

296 Payments to fiscals, and by fiscals' officers, shall be made in manner and subject to the rules following, and not otherwise :

Payments to
fiscals, and by
fiscals'
officers, how
to be made.

- (1) Whenever any person, whether the original debtor or a purchaser of property sold in execution, shall (except as in clause (3) hereinafter provided) have occasion to pay money to the fiscal or deputy fiscal, he shall signify the same to such fiscal or deputy fiscal, who shall give him a note addressed to the government agent or assistant government agent of the form No. 58 in the second schedule hereto annexed, which the person who is to pay the money shall carry to the office of such government agent or assistant government agent, and deliver to the shroff or receiver of the office, and pay to him the amount stated in such note.
- (2) The receipt shall then be acknowledged by the signature of the government agent or assistant government agent on that part of the note reserved for that purpose, which shall be cut off and delivered to the person who shall have made the payment, the remaining part being reserved as the authority for receiving the money.
- (3) In cases of payment of ready money, whether under the provisions of section 275 or otherwise, or a partial payment for immovable property under the provisions of section 260,

the fiscal or deputy fiscal shall give a receipt accordingly; the stamps for such receipt to be furnished by the purchaser.

- (4) The fiscals' officers shall make payment of all deposits and ready money received by them, within such time after the receipt thereof as the fiscal shall prescribe, to the office of the government agent or assistant government agent, being furnished for that purpose with a note of the said form in the second schedule hereto.
- (5) A register of such notes in the form No. 59 in the said schedule, or in any other form as the Governor may from time to time prescribe, shall be kept by the fiscal, liable to the call of Government at any period.
- (6) In every case in which a payment shall have been made under sub-section (1) or (4) the government agent or the assistant government agent shall within forty-eight hours forward a receipt for such payment to the fiscal or deputy fiscal.

Moneys paid into government agent's office to be subject to order of court.

297 All moneys which may be paid into the office of any government agent or assistant government agent shall be retained until disposed of by order of the court whence the process of execution shall have issued: Provided always that nothing herein contained shall be construed to affect the powers vested by law in the Commissioners of the Loan Board.

Arrest and Imprisonment.

When debtor may be arrested in execution.

298 If the fiscal return to the writ of execution that he is unable to find any property of the judgment-debtor, movable or immovable, or if before the return to the writ of execution is made the court is satisfied on the application of the judgment-creditor made by

petition, to which the judgment-debtor need not be named respondent, that the judgment-debtor—

- (a) Has not pointed out to the fiscal any property for seizure and sale, although requested so to do ; or
- (b) Has not, after reasonable efforts made for the purpose, been found by the fiscal, and the judgment-creditor does not know of any property of the judgment-debtor which can be seized in execution ; or
- (c) With intent to obstruct or delay the execution of the decree, is about to abscond or to leave the jurisdiction of the court, or with the like intent has disposed of or removed his property or any part thereof from the reach of the fiscal ; or
- (d) Is about to leave the island under circumstances affording reasonable probability that the judgment-creditor will thereby be obstructed or delayed in the execution of the decree ;

the court may issue a warrant for the arrest of the judgment-debtor, but in no case whatever shall the court issue a warrant under this Ordinance for the arrest or imprisonment of a woman in execution of a decree for money.

Under the warrant so issued the judgment-debtor may be arrested at any hour, and on any day, and in any place, subject to the provisions hereinafter in section 365 contained, and shall thereupon, as soon as practicable, be brought before the court. Provided that no house shall be entered after sunset and before sunrise for the purpose of making an arrest under this section. Provided also that when the judgment-debtor pays the amount of the decree or order in execution of which he is arrested, and the cost of the arrest, to the officer arresting him. such officer shall at once release him.

Arrest under
warrant.

Proviso 1.

Proviso 2.

A writ against person can issue only after a writ against property has issued [*Soysa v. Soysa*, 1 S. C. R. 28 ; 2 C. L. R. 15], but it may, in the circumstances mentioned in paragraphs (a), (b), (c), and (d), issue before the return to the latter writ [*Sinnappar v. Veerapodi*, 3 N. L. R. 254].

Where a writ against property is issued under an order which *improvide emanavit*, the writ and the return thereto are bad, as also a warrant of arrest issued on the strength of such return and the commitment of the defendant to prison [*Meera Saibo v. Samaranayaka*, 1 N. L. R. 342 ; *Sinnappar v. Veerapodi*, 3 N. L. R. 254].

The word "court" in this section means the place where the judge is empowered to act judicially, and is in fact so acting [*Mohidin v. Nalle Tamby*, 1 N. L. R. 377].

Per LAWRIE, J.—An order of commitment or release of a civil prisoner is a judicial act which can competently be done in chambers, and "chambers" includes the judge's own house, if it is situated in the town where his court is [*ibid*].

The warrant for the arrest of an insolvent stated the amount of the debt of the insolvent incorrectly, *held*, that his arrest under the warrant was illegal, and the District Judge had no power to amend the warrant [*In the Matter of the Insolvency of Tillekeratne*, 1 Tamb. Rep. 30].

No arrest for sum under two hundred rupees.

299 Notwithstanding anything in the last foregoing section, no warrant for the arrest of a judgment-debtor shall, except as in this section otherwise provided, issue in execution of a decree wherein the sum awarded, inclusive of interest, if any, up to the date of the decree, but exclusive of any further interest and of costs, shall not amount to two hundred rupees or upwards.

Exception in case of fraud.

If at any time it shall appear to the court before which any action shall be tried that the defendant in incurring the debt or liability which is the subject of such decree has obtained credit from the plaintiff under false pretences, or with a fraudulent intent, or has wilfully contracted such debt or liability without having at the time of so contracting the same a reasonable assurance of being able to pay or discharge the same, or has made or caused to be made any gift, delivery, or transfer of any property, or has removed or concealed any property with an intent to defraud his creditors

or any of them, it shall be lawful for such court in its discretion in making such decree to order that such defendant be taken and detained in execution for any time not exceeding six months, and whether or not execution against the property of such defendant shall be issued in virtue of such decree.

A defendant having a decree for costs only may issue execution against person on a judgment, when those costs amount to or exceed Rs. 200. A plaintiff obtaining a specific decree in respect of movable or immovable property with costs cannot issue execution against the person, whatever the costs may be [*Soysa v. Pullenayagam*, 1 S. C. R. 28 ; 2 C. L. R. 15. See *Pullenayagam v. Pullenayagam*, 2 C. L. R. 82].

A warrant of arrest may issue under this section for recovery of a balance less than Rs. 200, provided the decree was for a larger amount [*Silva v. Sella Umma*, 2 S. C. R. 155 ; 3 C. L. R. 41].

300 When a judgment-debtor is brought before the court after being arrested in execution of a decree for money, and it appears to the court that the judgment-debtor is unable from poverty or other sufficient cause to pay the amount of the decree, or, if that amount is payable by instalments, the amount of any instalment thereof, the court may, upon such terms, if any, as it thinks fit, make an order directing his release.

Where debtor is unable to pay, court may order release :

See section 337a of the Indian Code.

Under this section the court has no power to alter, to the creditor's disadvantage, the terms of the decree, and it cannot therefore allow the debtor the privilege of paying the amount of the decree by instalments. The terms intended by the section must be terms onerous to the debtor and not to the creditor [*Supermanian v. Perumal*, 1 N. L. R. 371].

The policy of the law now is to discourage the incarceration of honest debtors, who, from misfortune and poverty, cannot pay their debts, and to confine the creditor's remedy of imprisoning his debtor only, or at least mainly, to cases where the debtor is contumacious, and will not pay or disclose for seizure funds over which he has control [*ibid*].

PER LAWRIE, J., in *Mohidin v. Nalle Tamby* [1 N. L. R. 377].—Where a judge finds that he was in error in discharging a judgment-debtor arrested on a warrant of arrest, and that the creditor had used due diligence in the conduct of the warrant, he may issue a fresh warrant or re-issue the old one.

The order of the Commissioner of a Court of Requests discharging a judgment-debtor, presumably under this section, has the effect of a final judgment [*Charles v. Goonetilleke*, 1 Tamb. Rep. 40].

but may take
certain
matters into
consideration,

301 Before making an order under section 300 the court may take into consideration any allegation of the decree-holder touching any of the following matters :

- (a) The decree being for a sum for which the judgment-debtor was bound as a trustee or as acting in any other fiduciary capacity to account ;
- (b) The transfer, concealment, or removal by the judgment-debtor of any part of his property after the date of the institution of the action in which the decree was made, or the commission by him after that date of any other act of bad faith in relation to his property, with the object or effect of obstructing or delaying the decree-holder in the execution of the decree ;
- (c) Any undue or unreasonable preference given by the judgment-debtor to any of his other creditors ;
- (d) His refusal or neglect to pay the amount of the decree or some part thereof when he has, or since the date of the decree has had, the means of paying it ;
- (e) The likelihood of his absconding or leaving the jurisdiction of the court with the object or effect mentioned in sub-section (b).

See section 337*a* of the Indian Code.

and pending
decision may
imprison or
release on
security.

302 While any of the matters mentioned in section 301 are being considered, the court may in its discretion order the judgment-debtor to be imprisoned, or release him on his furnishing sufficient security for his appearance on the requisition of the court.

See section 337*a* of the Indian Code.

303 A judgment-debtor released under section 300 or 302 may be re-arrested. Re-arrest.

See section 337a of the Indian Code.

304 If the court does not make such an order as is mentioned in section 300, it shall, subject to the other provisions of this Ordinance, commit the judgment-debtor to jail. Committal.

See section 337a of the Indian Code.

A District Judge has no power to order the committal or release of a judgment-debtor arrested on a warrant when he has not the debtor before him [*Mohidin v. Nalle Tamby*, 1 N. L. R. 377].

305 Every warrant for the arrest of the judgment-debtor shall direct the officer entrusted with its execution to bring him before the court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the costs, if any, to which he is liable, be sooner paid. On arrest, debtor to be brought before the court unless he pays.

Upon the judgment-debtor being brought before the court under such warrant of arrest, if he pays the amount of the decree and the costs of the arrest into court, or if he gives security for the payment of the same to the satisfaction of the judgment-creditor, or if he satisfies the court as is next hereinafter provided, either that he has no seizable property or that he is ready and willing to point out all such saleable property as he possesses for sale in satisfaction of the decree against him, then the court shall release him from arrest; otherwise, the court shall commit him to jail in execution of the decree by warrant in the form No. 61 in the second schedule hereto annexed, or to the like effect. Court, if he pays or gives security for debt, or on being satisfied that he has no property, to release him; otherwise to commit him to jail.

The first paragraph of this section is the same as section 337 of the Indian Code.

The law reposes in courts large discretionary powers to release debtors arrested and brought before them [*Muttiah v. Meera Lebbe*, 1 S. C. R. 244]. Where a District Judge released a debtor brought before the court on the ground that the writ ought not to have been allowed, as it had been, on the *ex parte* application of the plaintiff, *held*, that the proper course for the

plaintiff was not to appeal against the order of release, but to move the District Court for a re-issue of the writ against person after due service of the application on the defendant [*ibid*].

A debtor who had been committed was refused admittance to prison. He was thereupon taken to the judge at his house. He then voluntarily offered to appear in court the next day, and was allowed to go, no order of discharge having been made. *Held*, that the debtor's re-arrest and commitment to jail on a subsequent day were illegal [*Suppamanian v. Curera*, 3 N. L. R. 193].

A District Judge cannot act judicially except in court, and an order of discharge made at his house is liable to be set aside as invalid [*ibid*].

The defendant may be detained for such a reasonable time as is sufficient to allow of his being brought before the court and having an opportunity of applying for his discharge. The detention of a defendant after such reasonable time and without further authority of law is illegal [*In re Shambhoo Chunder, Bourke*, 59; *Shamsoonessa v. Anne Love*, I. L. R. 11 Cal. 527].

Debtor in custody may at any time apply for discharge,

306 Any judgment-debtor arrested or imprisoned in execution of a decree for money may apply by petition in the way of summary procedure to the court which passed the decree for his discharge from custody, on the ground either that he has no property which can be sold in execution of the decree, or that he is ready and willing to point out all such saleable property as he possesses for sale in execution of the decree.

The section corresponding to this in the Indian Code would appear to be section 344; but in the procedure under the Indian Code a judgment-debtor arrested or imprisoned as stated in this section may apply to be declared an insolvent, and if sufficient cause is shown the court may declare him an insolvent and appoint a receiver of his property, and then the same consequences as to non-liability to re-arrest, &c., as under our Code follow.

When a judgment-debtor applies for his discharge under this section on the ground that he has no property which can be sold in execution of the decree, he must make oath as to non-commission by him of the acts specified in sub-sections (b) and (c) of section 311 [*Velliappa v. Peiris*, 3 N. L. R. 19].

on sufficient affidavit.

307 The affidavit by which such petition is supported shall state:—

(a) The facts of the petitioner's arrest, or imprisonment;

- (b) The amount, kind, and particulars of his property, and the value of so much thereof as does not consist of money ;
- (c) The situation and circumstances of the property ;
- (d) The petitioner's willingness to enable the fiscal to seize it ;
- (e) The amount and particulars of all pecuniary claims against him ; and
- (f) The names and residences of his creditors, so far as they are known to, or can be ascertained by, him.

See section 345 of the Indian Code.

308 On any such application so supported being made, the court shall make an order thereon in the alternative (b) of section 377, provided the petitioner pays the cost of serving the order upon the judgment-creditor at whose instance he was arrested or imprisoned, and on the other judgment-creditors, if any, mentioned in the affidavit.

Procedure thereon.

See section 347 of the Indian Code.

309 Where the applicant is under arrest and not yet committed to prison, the court may commit him to prison until the day appointed for the hearing of the petition, or until the day to which the hearing may be from time to time adjourned; or release him on his furnishing sufficient security that he will appear when called upon.

Court may commit, or release on security pending the hearing.

See section 349 of the Indian Code.

This section does not apply if the debtor is in jail. He can then only be released under section 317 [see *In re Quarmer*, I. L. R. 8 Mad. 503].

310 On the day fixed for the hearing of the petition or on any subsequent day to which the court may have adjourned the hearing, the court shall, if all the parties are present, or if it is satisfied that notice of

Examination of petitioner.

the day was duly served on the absent parties, examine the petitioner as to his then existing circumstances and his future means of paying the money due from him under the decree, and shall hear the judgment-creditor and other respondents in opposition to the applicant's discharge, and may, if it thinks fit, postpone the hearing to allow the respondents to adduce evidence.

See section 350 of the Indian Code.

It is only after the court is satisfied that the allegations made by the debtor in his petition and examination are true that the creditors should be called on to show cause [*Abdool Rahman v. Abdool Sobhan*, 12 W. R. 125].

When court
may
discharge
petitioner.

311 If at such hearing the court is satisfied—

- (a) That the statements in the affidavit are substantially true ;
- (b) That the applicant has not, with intent to defraud his judgment-creditor, concealed, transferred, or removed any part of his property since the institution of the action in which the decree in the course of being executed was passed ; and
- (c) That he has not committed any act of bad faith regarding the matter of his petition ;

it shall discharge the petitioner.

If, however, at such hearing the court is not satisfied that these three conditions are fulfilled, it shall commit the petitioner to prison, or shall refuse to discharge him from prison, as the case may be.

See section 351 of the Indian Code.

The consideration of "bad faith" under sub-section (c) must be limited to the matter of the application for discharge, and it is not open to the court to go behind the decree into which the original debt had been converted to see in what way the original debt had been incurred [*Velliappa v. Pieris*, 3 N. L. R. 31].

The applicant must make a full disclosure. If a *prima facie* case is made out that he has not fully disclosed his property, he is bound, as having the best knowledge of the circumstances, to rebut that evidence on oath [*Gunga Churn v. Kulinga*, 12 W. R. 422].

If the statements in the application are substantially true, and the debtor has not brought himself within clauses (b) and (c) of this section, the court is bound to grant the application [*Salamat v. Minahan*, I. L. R. 4 Alla. 337]. To bring the case within clause (b) there must be an active concealment, &c., since the date of the decree [*Sukrit v. Raghunath*, I. L. R. 7 Alla. 445].

“Bad faith” under clause (c) is limited to bad faith in respect of the application, and not to the act committed in incurring the liability [*Butler v. Lloyd*, 12 B. L. R. App. 12]; and where the original debt was converted into a judgment debt the judge should not go behind the decree to see in what way the original debt had been incurred [*Salamat Ali v. Minahan*, I. L. R. 4 Alla. 337].

Where a judgment-debtor is declared to be discharged under this section, but the procedure prescribed in it has not been followed, the order must be treated as a nullity, and will not bar a subsequent application to arrest him [*Luchmee Narain v. Bheerio Pershad*, 2 Agra, Mis. 4. See *Arunachalam Ayyavu*, I. L. R. 7 Mad. 318].

312 A judgment-debtor who has been discharged from arrest or imprisonment in execution of a decree under the last preceding section shall not be again arrested in execution of the same decree.

Effect of
discharge.

313 No judgment-debtor shall be arrested in execution of a decree unless and until the decree-holder pays into court such sum as the judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the court, and, where the writ is to be executed in another district, such further sum as the judge thinks sufficient to cover the expenses of his transport to the court issuing the writ.

Sufficient
interim
subsistence
money to be
deposited
before arrest.

See paragraph 1 of section 339 of the Indian Code.

314 And when a judgment-debtor is committed to jail in execution of a decree, the court shall fix for his subsistence such monthly allowance as he may be entitled to at rates to be fixed by order of Government from time to time, as occasion shall require.

Subsistence
allowance
during
imprisonment
to be fixed on
commitment.

See paragraph 2 of section 339 of the Indian Code.

Allowance to
be paid
monthly in
advance.

315 The monthly allowance fixed by the court shall be supplied to the fiscal by the party on whose application the decree has been executed by monthly payments in advance before the first day of each month.

The first payment shall be made for such portion of the current month as remains unexpired before the judgment-debtor is committed to jail.

See paragraph 3 of section 339 of the Indian Code.

The payment of subsistence money must be in advance. Where a prisoner was arrested on 4th August, and committed to prison in the evening of the same day, and only twenty-seven days' subsistence money was paid in, it was held that the provisions of the corresponding section of the Indian Code had not been complied with, although a sum making the amount sufficient for twenty-eight days was deposited next day [*Dutt v. Cornelis*, 5 B. L. R. App. 79].

Subsistence
money to be
deemed costs.

316 Sums of money disbursed by the decree-holder for the subsistence of the judgment-debtor in jail shall be deemed to be costs in the action.

Proviso.

Provided that the judgment-debtor shall not be detained in jail or arrested on account of any sum so disbursed.

See section 340 of the Indian Code.

When debtor
entitled to be
discharged
from jail.

317 The judgment-debtor shall be discharged from jail—

- (a) On the decree being fully satisfied ; or
- (b) At the request of the person on whose application he has been imprisoned ; or
- (c) On such person omitting to pay the allowance as hereinbefore directed ; or
- (d) If the judgment-debtor be declared an insolvent, and an order in insolvency is made by the district court protecting him from arrest ; or
- (e) When the term of his imprisonment as limited by section 318 is fulfilled.

Proviso 1.

Provided that in the first, second, third, and fourth cases mentioned in this section the judgment-debtor shall not be discharged without the order of the court.

A judgment-debtor discharged under this section is **Proviso 2.** not thereby discharged from his debt, but he cannot be re-arrested under the decree in execution of which he was imprisoned.

Immunity from further process is only obtained by actual confinement [*Subha v. Venkata*, I. L. R. 8 Mad. 21]; or if the discharge takes place after the warrant of committal has been made out [*Princepa v. Maneswar*, I. L. R. 9 Bom. 181].

Where a decree is payable in instalments, the debtor cannot be imprisoned for default in the payment of each instalment [*Damodar v. Malhari*, I. L. R. 7 Bom. 106].

Under this section the immunity of a judgment-debtor from a second arrest depends, not only upon his having been arrested, but upon his having been imprisoned under the arrest [*Rajendra v. Chuuder*, I. L. R. 23 Cal. 128].

318 No person shall be imprisoned in execution of a decree for a longer period than six months. **Limit of imprisonment.**

Same as paragraph 1 of section 342 of the Indian Code.

This and the preceding section do not apply to cases of imprisonment for contempt of court [*Martin v. Laurence*, I. L. R. 4 Cal. 655].

On the expiration of the period the prisoner is entitled to his discharge whether the imprisonment has been continuous or only at intervals [*Khoda Buksh v. Sukroolah*, 5 Alla. 220]. The imprisonment is not a satisfaction of the decree, and the debtor can be adjudicated an insolvent for it [*In the Matter of Ram Chandra*, 6 Bom. 86].

319 The fiscal shall endorse upon the warrant of arrest the day on and the manner in which it was executed, and if the latest day specified in the warrant for the return thereof has been exceeded, the reason of the delay; or if it was not executed, the reason why it was not executed, and shall return the warrant with such endorsement to the court. **Endorsement on the warrant.**

See section 343 of the Indian Code.

(B)—Decrees for Delivery of Movable Property.

320 If the decree is for any specific movable or for any share in a specific movable, application to the court for execution of the decree by seizure and delivery **Application for execution of decree for delivery of**

movable
property,
how to be
made.

may be made by the judgment-creditor in the manner and according to the rules prescribed for execution of decrees under head (4), so far as the same are applicable; and if the court on such application is satisfied

Form of writ.

that the judgment-creditor is entitled to obtain execution of the decree, it shall direct a writ of execution to issue to the fiscal in the form No. 62 in the second schedule.

See section 259 of the Indian Code.

Fiscal to
procure
delivery
thereunder.

321 Upon receiving the writ the fiscal or his officer shall as soon as reasonably may be repair to the dwelling house or place of residence of the judgment-debtor, and there showing him the writ shall demand delivery of the movable or, if practicable, the share thereof specified therein, and on his failing to comply with his demand the fiscal or his officer shall, if possible, seize the said specific movable or share thereof, and deliver the same to the judgment-creditor or to the person authorised by him to receive it.

Procedure on
default.

If the judgment-debtor fails to comply with the fiscal's demand, and if the fiscal is unable to obtain for the judgment-creditor delivery of the specific movable or share thereof mentioned in the writ, then the court upon being satisfied of these facts may, on application made to it by the judgment-creditor by petition, to which the judgment-debtor is made respondent, direct a writ of execution by seizure and sale of the judgment-debtor's property, or a warrant for the arrest of the judgment-debtor, or both, to issue to the fiscal.

Amount to be
levied and
manner of
execution.

322 The amount of money directed to be levied in the writ of execution by seizure and sale issuing under the preceding section shall be the amount of pecuniary loss, as nearly as the court can estimate it, which is occasioned to the judgment-creditor by reason of the judgment-debtor's default in making delivery

of the specific movable or share thereof according to the terms of the decree, and which the court shall award by way of compensation to the judgment-creditor by the order directing the writ to issue ; and the execution of this writ, and of the warrant of arrest issuing under the same section, shall be effected according and subject to the rules prescribed for the writ of execution and warrant of arrest issued for the enforcement of decrees falling under head (A).

The provisions of this section and the two preceding ones seem to be in accordance with the Roman-Dutch Law and practice, but inconsistent with the English action of detinue [*Sheik Ali v. Carrimjee Jafferjee*, 1 N. L. R. 117; *Sithamparapillai v. Vinasi-tamby*, 1 N. L. R. 114].

See section 191 and the note thereto.

(C)—*Decrees for Possession of Immovable Property.*

323 If the decree or order is for the recovery of possession of immovable property or any share thereof by the judgment-creditor, or if it directs the judgment-debtor to yield or deliver up possession thereof to the judgment-creditor, application to the court for execution of the decree may be made by the judgment-creditor in the manner, and according to the rules, prescribed for execution of decrees under head (A), so far as the same are applicable ; and if the court on such application is satisfied that the judgment-creditor is entitled to obtain execution of the decree, it shall direct a writ of execution to issue to the fiscal in the form No. 63 in the second schedule.

Application for execution of decree for delivery of immovable property, how to be made.

Form of writ.

324 Upon receiving the writ the fiscal or his officer shall as soon as reasonably may be repair to the ground, and there deliver over possession of the property described in the writ to the judgment-creditor or to some person appointed by him to receive delivery on his behalf, and if need be by removing any person bound by the decree who refuses to vacate the property ; provided that as to so much of the property, if any, as is

Fiscal how to proceed thereunder.

in the occupancy of a tenant or other person entitled to occupy the same as against the judgment-debtor, and not bound by the decree to relinquish such occupancy, the fiscal or his officer shall give delivery by affixing a copy of the writ in some conspicuous place on the property and proclaiming to the occupant by beat of tom-tom, or in such other mode as is customary, at some convenient place, the substance of the decree in regard to the property ; and provided also that if the occupant can be found, a notice in writing containing the substance of such decree shall be served upon him, and in such case no proclamation need be made.

The cost (to be fixed by the court) of such proclamation shall in every case be prepaid by the judgment-creditor.

See section 264 of the Indian Code.

Where a writ-holder is put in possession of movables or immovables in execution of a decree, and the decree is subsequently set aside in appeal, the party deprived of possession is entitled to an order replacing him in possession [*Patunni v. Mohamado*, 1 S. C. R. 343].

Refusal to yield possession of land when required by the Fiscal does not amount to a contempt of court [*Fernando v. Fernando*, 2 S. C. R. 145].

Resistance to Execution of Proprietary Decrees.

Procedure in event of resistance to execution of writ or delivery of property.

325 If in the execution of a decree for the possession of property under heads (B) and (C) the officer charged with the execution of the writ is resisted or obstructed by any person, or if after the officer has delivered possession the judgment-creditor is hindered by any person in taking complete and effectual possession, the judgment-creditor may at any time within one month from the time of such resistance or obstruction complain thereof to the court by a petition in which the judgment-debtor and the person resisting and obstructing shall be named respondents, and which shall be dealt with by the court in accordance with the alternative (b) of section 377.

This section is substantially the same as section 328 of the Indian Code.

A petition under this section, although it is required by section 327 to be registered and numbered as a plaint in an action, need not contain all the requisites of a plaint, such as disclosing a cause of action against the respondent. No formal pleadings need be filed [*Domingo v. Sauderesekera*, 2 C. L. R. 108].

Quære, whether proceedings under this section and the following sections can properly be said to be proceedings for enforcing a decree of possession [*Abeyedere v. Markar*, 2 N. L. R. 19].

In calculating the time of one month the date on which the resistance took place is to be excluded [*Dadu v. Balgarda*, 5 Bom. 39].

This section is not imperative. The omission to take action under it does not preclude a decree-holder from bringing a fresh suit to recover possession, if he is ousted after his formal institution in possession or against any party obstructing him [*Jugmohun v. Baldeo*, 3 Agra. 162; *Balrunt v. Babaji*, I. L. R. 8 Bom. 602]. In the latter case he may make a fresh application for delivery of possession [*Muttra v. Appasami*, I. L. R. 13 Mad. 504].

Where a writ has been issued and returned not executed owing to obstruction, and a second then issues and its execution is obstructed, time runs from the date of the second obstruction [*Ramasekera v. Dharmaraya*, I. L. R. 5 Mad. 113].

326 On the hearing of the matter of the petition of complaint so made, the court, if it is satisfied that the obstruction or resistance complained of was occasioned by the judgment-debtor or by some person at his instigation, may commit the judgment-debtor or such other person to jail for a term which may extend to thirty days, and direct the judgment-creditor to be put into possession of the property.

Punishment
of person
obstructing if
acting on
behalf of
judgment-
debtor.

See section 329 of the Indian Code.

The penal provision of this section applies only to one of the two offences mentioned in section 325, viz., that of resisting or obstructing the officer charged with a writ of possession, and does not apply to the offence of hindering a judgment-creditor from taking complete and effectual possession after the officer has delivered possession [*Dissanaike v. Tamby Chetty*, 1 S. C. R. 257; *Menick v. Hanmy*, 1 S. C. R. 332; 2 C. L. R. 145].

The resistance contemplated by this section must occur at the time of the delivery of possession to the judgment-creditor, and not at any time after the delivery. So, where more than three months after an execution-creditor was put in possession of land under a writ in execution of a decree, the judgment-debtor and others at his instance hindered the execution-creditor in the exercise of his right over the land, *held*, that the procedure by petition prescribed by this section did not apply [*Menick v. Haney*, 1 S. C. R. 332; 2 C. L. R. 145].

If resistance
be made by
bonâ fide
claimant in
possession,
court to direct
action and

to try and
determine the
same.

327 If the resistance or obstruction is found by the court to have been occasioned by any person other than the judgment-debtor claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the court shall direct the petition of complaint to be numbered and registered as a plaint in an action between the decree-holder as plaintiff and the claimant as defendant; and the court shall, without prejudice to any proceedings to which the claimant may be liable for the punishment of such resistance or obstruction, proceed to investigate the claim in the same manner and with the like power as if an action for the property had been instituted by the decree-holder against the claimant; and shall pass such order as it thinks fit for executing or staying execution of the decree.

This section is substantially the same as section 331 of the Indian Code.

Where A, a purchaser in execution of certain immovable property, obtained under section 287 an order on the Fiscal for delivery to him of the property purchased; and, in execution of this order, the Fiscal was resisted by B and C, who were in possession of the property, and claimed it as their own; and A thereupon petitioned the court under section 325, *held*, that if the court found that the resistance had been occasioned by B and C claiming in good faith to be in possession of the property on their own account, A was entitled to have his petition numbered and registered as a plaint, and proceedings thereon taken under this section; but before the court directed the petition to be so numbered and registered, it should put on record its distinct finding, if that be so, that B and C were claiming in good faith to be in possession of the property on their own account [*Perrera v. Brumby*, 2 N. L. R. 121].

The title of the decree-holder in a proceeding under this section will be tried under the procedure adopted in a suit for title [*Cinnasamo v. Krishna Pillai*, I. L. R. 3 Mad. 104].

An order rejecting an application as too late does not preclude the losing party from bringing a regular suit [*Bani Pershad v. Lachman*, I. L. R. 4 Alla. 131].

The courts in hearing a case under this section are not limited to the question of possession. They can decide any question of title arising between the contending parties in connection with the right of possession [*Mollakhan v. Gorikhan*, I. L. R. 14 Bom. 627. See *Rukhal v. Watson & Co.*, I. L. R. 10 Cal. 50].

328 If any person other than the judgment-debtor is dispossessed of any property in execution of a decree, and such person disputes the right of the decree-holder to dispossess him of such property under the decree, on the ground that the property was *bonâ fide* in his possession on his own account or on account of some person other than the judgment-debtor, and that it was not comprised in the decree, or that, if it was comprised in the decree, he was not a party to the action in which the decree was passed, he may apply to the court by petition stating his grounds of dispute.

So too, if *bonâ fide* claimant be dispossessed in effecting the execution.

If, after examining the applicant, it appears to the court that there is probable cause for making the application, the application shall be numbered and registered as a plaint in an action between the applicant as plaintiff and the decree-holder as defendant, and the court shall proceed to investigate the matter in dispute in the same manner and with the like power as if an action for the property had been instituted by the applicant against the decree-holder, and shall pass such order as it thinks fit for executing or staying execution of the decree or restoring the applicant to possession.

Procedure.

In hearing an application under this section the court shall confine itself to the grounds of dispute above specified.

Nothing in this section or section 326 applies to a person to whom the judgment-debtor has transferred

the property after the institution of the action in which the decree is made.

If the property which the judgment-creditor is obstructed or hindered in obtaining possession of is an undivided share of property, the court shall in the actions instituted under section 327 and this section cause all the shareholders to be made parties.

This section is substantially the same as a portion of section 332 of the Indian Code.

A wife who petitions under this section for removal from the possession of land on a decree against her husband is entitled to have her petition inquired into, and her right to the land decided [*Juan Appu v. Diogu*, 2 N. L. R. 205].

The investigation on an application numbered and registered under this section should be limited to the question as to whether the applicant is entitled to be restored to possession of the property claimed by him. The question of title should not be gone into. The final order on such application should not be in the form of a decree in a regular suit, but one merely directing that the applicant be restored to possession [*Rosahamy v. Diago*, 3 N. L. R. 203].

If in execution of a decree a claim made by a third party in possession is rejected, he can either bring a regular suit or wait until he is dispossessed under this section [*Ferguson v. Nil Komul*, 23 W. R. 270]; and then he may take action under it or bring a regular suit [*Kishen v. Fuheerooddin*, W. R. 1864, p. 61. See *Gulabhai v. Jimubhai*, I. L. R. 13 Bom. 213].

The fact that the examination of the applicant shows that he had not originally obtained possession in a strictly legal manner is no ground for rejection of the application [*Obhoya v. Rajendra*, 22 W. R. 406].

If there are several applications each should be tried separately [*Sharada v. Nobin Chunder*, 11 W. R. 255].

The onus is on the applicant [*Mahomed v. Prokash*, 8 W. R. 8]. He should confine himself to proving possession, and leave the decree-holder to prove his right to take possession [*Joodornath v. Kalee*, 14 W. R. 358].

Effect of final order in these cases.

329 The final order passed under either of sections 327 and 328 shall be in the nature of, and shall have the same force as, a decree in a regular action, and shall be subject to the same conditions as to appeal or otherwise.

330 If it appears at the hearing of the judgment-creditor's complaint that the resistance or obstruction was occasioned by any person other than the judgment-debtor, not in occupation of the property sold but claiming a right thereto as proprietor, mortgagee, lessee, or under any other title, the court shall pass such order on the matter of the resistance or obstruction as it thinks fit.

Procedure where party resisting is not judgment-debtor and not in possession.

The party against whom such order is passed may within one month institute an action to establish the right which he claims to the present possession of the property, but subject to the result of such action, if any, the order shall be final.

See the concluding paragraph of section 332 of the Indian Code.

(D)—Decrees for Execution of Conveyance or Transfer of Property.

331 If the decree is for the execution of a conveyance, or for the endorsement of a negotiable instrument, and the judgment-debtor neglects or refuses to comply with the decree, the decree-holder may prepare the draft of a conveyance or endorsement in accordance with the terms of the decree, and apply to the court by petition, not naming a respondent, to have the said draft served on the judgment-debtor.

Application for enforcement of decree for execution of any instrument, how to be made.

Substantially the same as paragraph 1 of section 261 of the Indian Code.

332 The court shall thereupon cause the draft and a copy of the petition to be served on the judgment-debtor in manner hereinbefore provided for serving a summons, together with a notice in writing stating that his objections, if any, thereto, shall be made within such time (mentioning it) as the court fixes in this behalf, and will come on before the court to be considered and determined on a day to be named in the notice for that purpose.

Service of the draft conveyance on judgment-debtor.

The decree-holder may also tender a duplicate of the draft to the court for execution, supplying a stamp of the proper amount if a stamp is required by law.

On proof of such service the court, or such officer as it appoints in this behalf, shall on the day appointed for the consideration of objections, if no objections are made, proceed to execute the duplicate so tendered, or may, if necessary, alter the same, so as to bring it into accordance with the terms of the decree, and execute the duplicate so altered.

Objections to draft.

But in the event of the judgment-debtor or any other party on that day objecting to the draft so served, provided the objections have been stated in writing and filed within the time fixed therefor, the court shall proceed to hear and determine such objections, and shall thereupon pass such order as it thinks fit, and execute, or alter and execute, the duplicate in accordance therewith.

Substantially the same as the latter part of section 261 of the Indian Code.

The officer appointed by the court cannot enter into covenants on behalf of the judgment-debtor [*Ram Chunder v. Dwarkanath*, I. L. R. 16 Cal. 330].

It is probably necessary to have a conveyance executed under this section registered [see *Kanahia Lal v. Kali Din*, I. L. R. 2 Alla. 392].

Execution of the instrument by the court.

333 The execution of a conveyance or the endorsement of a negotiable instrument by the court under the last preceding section may be in the following form: "*C. D.*, judge of the court of ———— (*as the case may be*), for *A. B.*, in an action by *E. F.* against *A. B.*," or in such other form as the Supreme Court may from time to time prescribe, and shall have the same effect as the execution of the conveyance or endorsement of the instrument by the party ordered to execute or endorse the same, and such conveyance shall be binding and of force though not executed

before a notary public. And the court shall deliver the original of such conveyance to the decree-holder, and shall transmit the duplicate to the registrar of lands for the district in which the land is situate, in like manner as now is or shall be required to be done by notaries in respect of deeds executed before them.

This section is substantially the same as section 262 of the Indian Code.

(E, F) Mandatory and Restraining Decrees.

334 When a decree or order, falling under either of the heads (*E*) or (*F*) has been passed, and the judgment-debtor has had an opportunity of obeying the decree or order, but has wilfully failed to obey it, application to the court for execution or enforcement of the decree or order may be made by the judgment-creditor by petition to which the judgment-debtor shall be made respondent; and which shall set out the damage, if any, caused to the judgment-creditor by the disobedience of the judgment-debtor to the decree or order. And if the court on the hearing of such application is satisfied that the judgment-creditor is entitled to obtain execution or enforcement of the decree or order, it shall direct a writ of execution by seizure and sale of the judgment-debtor's property, or a warrant for the arrest of the judgment-debtor, or both, to issue to the fiscal.

Application for enforcement of mandatory decrees, how to be made.

Court may issue writ of execution by seizure and sale.

335 The amount of money directed to be levied on the writ of execution issuing under the preceding section shall be the amount of pecuniary loss, if any, as nearly as the court can estimate it, which is occasioned to the judgment-creditor by reason of the judgment-debtor's default in obeying the decree or order, and which the court shall award by way of compensation to the judgment-creditor by the order directing the writ to issue. And the execution of this writ and of the warrant of arrest issuing under the same section shall

Amount to be levied under writ.

be effected according, and subject, to the rules prescribed for the writ of execution and warrant of arrest issued for the enforcement of decrees falling under head (4).

General Provisions.

Discretion of court to issue execution.

336 The court may in its discretion refuse to issue execution at the same time against the person and property of the judgment-debtor in cases when the judgment-creditor is entitled to apply for both simultaneously.

See section 230 of the Indian Code.

When subsequent application may be made for execution of decree partly satisfied.

337 Where an application to execute a decree for the payment of money or delivery of other property has been made under this chapter and granted, no subsequent application to execute the same decree shall be granted unless the court is satisfied that on the last preceding application due diligence was used to procure complete satisfaction of the decree, or that execution was stayed by the decree-holder at the request of the judgment-debtor. Also no such subsequent application shall be granted after the expiration of ten years from any of the following dates (namely) :

- (a) The date of the decree sought to be enforced, or of the decree, if any, on appeal affirming the same ; or
- (b) Where the decree or any subsequent order directs the payment of money or the delivery of property to be made at a specified date,—the date of the default in making the payment or delivering the property in respect of which the applicant seeks to enforce the decree.

Nothing in this section shall prevent the court from granting an application for execution of a decree after the expiration of the said term of ten years, where the judgment-debtor has by fraud or force prevented the execution of the decree at some time

within ten years immediately before the date of the application.

See section 230 of the Indian Code.

This section does not apply on the question of prescription to decrees obtained before the passing of the Code. Such decrees are still governed in regard to prescription by section 5 of Ordinance No. 22 of 1871 [*Wijesekere v. Jayesuriya*, 1 S. C. R. 307 ; 2 C. L. R. 112].

In the absence of any evidence to satisfy the court, as provided in this section, that in the last preceding application for execution due diligence had been used to procure complete satisfaction of the decree, or that execution was stayed at the request of the judgment-debtor, leave to execute the decree should not be granted [*Meera Saibo v. Samaranyaka*, 1 N. L. R. 342].

A judgment-creditor cannot be said to have used due diligence to secure complete satisfaction of the decree as contemplated by this section, and he is not entitled to make a second application for execution if, on the first issue of the writ, he did not take steps to have the debtor examined under section 219 or arrested under section 298 [*Palaniappa v. Gomes*, 1 N. L. R. 356].

A decree for the sale of hypothecated property made in a suit for sale upon a mortgage bond is not a decree for the payment of money under this section [*Ram Charan v. Sheobarat*, I. L. R. 16 Alla. 418].

The "subsequent application to execute the same decree" mentioned in this section means a substantive application for execution in the form prescribed by section 224 [*Rahim Ali Khan v. Phul Chand*, I. L. R. 18 Alla. 482].

The decision of a court in execution is *res judicata* between the parties [*Munjal v. Grijakant*, I. L. R. 8 Cal. 51 ; *Kanju Mal v. Kanhia*, I. L. R. 7 Alla. 373]; and where a court rejects an application as barred, no subsequent application can be allowed [*Bandey Karrim v. Romesh Chunder*, I. L. R. 9 Cal. 65].

Preventing or evading arrest seems to constitute fraud [*Pattakara v. Rangasami*, I. L. R. 6 Mad. 365].

A construction put upon a decree in execution proceedings will bar a subsequent suit [*Kali Mundal v. Kadar Nath*, 6 Cal. L. R. 215 ; *Mungal v. Grijakant*, I. L. R. 8 Cal. 51].

Where a court gave judgment for plaintiff with respect to only a portion of his claim and rejected the rest, and the plaintiff appealed against the latter part of the decree and the Appellate Court confirmed the whole decree in appeal, *held*, that the decree of the lower court became incorporated in the decree of the Appeal Court, which was thenceforth the only decree to be executed, and that limitation with respect to the portion of the

plaintiff's claim allowed in the court below ran from the date of the judgment of the Appellate Court [*Sakhal Chand v. Velchand*, I. L. R. 18 Bom. 203].

Application by one of several decree-holders for execution of the decree on behalf of the whole.

338 If a decree has been passed jointly in favour of more persons than one, any one or more of such persons, or his or their legal representatives, may apply for the execution of the whole decree for the benefit of them all, or, where any of them has died, for the benefit of the survivors and those claiming under the deceased. The application for this purpose shall be made by petition to which the co-decree-holders or their representatives as well as the judgment-debtor shall be respondents.

If the court sees sufficient cause for allowing the decree to be executed on an application so made, it shall pass such order as it deems necessary for protecting the interests of the persons who have not joined in the application.

For the purposes of this chapter the term "legal representative" shall mean an executor or administrator, or in the case of an estate below the value of one thousand rupees, the next of kin who have adiated the inheritance. Provided, however, that in the event of any dispute arising as to who is the legal representative, the provisions of section 397 shall, *mutatis mutandis*, apply.

See section 231 of the Indian Code.

The application must be for the whole decree and not for any fractional share that the applicant may consider himself entitled to [*Benarsi v. Kwar*, I. L. R. 5 Alla. 27].

One joint decree-holder is not bound by the acts of another, who has compromised or received payment out of court [*Balgobind v. Bhowanee Deen*, 1 Agra Mis. 16]; and a joint decree-holder has no power to give a discharge out of court to a judgment-debtor for more than his own share of the decree [*Bibee Budhun v. Hafeezah*, 4 Cal. L. R. 70. See *Benarsi v. Kwar*, I. L. R. 5 Alla. 27], especially if the decree is for possession of land against the defendants as wrongdoers [*Anando v. Anando*, I. L. R. 14 Cal. 50]. The debtor should not, in the case of a decree for money, pay except jointly or to the extent of the admitted shares of the judgment creditors [*Mahima v. Pyarimohun*, 2 B. L. R. App. 43].

One of several decree-holders has no right to claim execution unless he satisfies the court that he has sufficient cause for asking for execution alone, and notice should therefore be given to the other decree-holders and the application disposed of in their presence [*Unrith Nath v. Chander Kishore*, 21 W. R. 31. See *Hurriah Chunder v. Kali Sundari*, I. L. R. 6 Cal. 594].

If the application is allowed, the judge must pass an order to protect the interests of the non-applicants. The order must reserve, in express terms, their rights to share in the proceeds of the execution [*Tarasundari v. Beharilal*, 1 B. L. R. 28].

339 If a decree is transferred by assignment in writing or by operation of law from the decree-holder to any other person, the transferee may apply for its execution by petition, to which all the parties to the action or their representatives shall be made respondents, to the court which passed it, and if on that application that court thinks fit, the transferee's name may be substituted for that of the transferor in the record of the decree, and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder.

Application by assignee of a decree for execution thereof, how to be made.

Provided that where the decree has been transferred by operation of law, the transferor need not be made respondent to the petition.

Proviso 1.

Provided also that where a decree against several persons has been transferred to one of them, it shall not be executed against the others.

Proviso 2.

In the case where one decree of court is seized in execution of another decree, the judgment-creditor of this second decree is in the situation of assignee of the judgment-creditor of the decree which is seized, provided the latter person is identical with the judgment-debtor of the decree in execution of which the seizure is made.

Proviso 3.

See section 232 of the Indian Code.

Where an application for substitution under this section is disallowed on cause shown, it is open to the assignee to institute a fresh action on the assignment [*Weerawaga v. Fernando*, 2 C. L. R. 207]. *Per* LAWRIE, J., in the same case.—Although the

assignee of a judgment could not in the first instance bring a separate action on the assignment, yet he could do so when he had been prevented by defendant's opposition from being substituted plaintiff in the original action and proceeding to execution therein. *Per* WITHERS, J.—The assignee could sue in a separate action for the judgment debt subject only to his being deprived of costs, or having to pay costs if such action was unnecessarily or vexatiously brought.

A decree of the District Court was affirmed in appeal by the Supreme Court. Steps having been taken to have the judgment of the Supreme Court brought up in review preparatory to an appeal to the Privy Council, a certificate was issued under section 781 of the Code and a day was fixed for the hearing of the case in review. Thereafter an assignee of the decree was allowed by the District Court to have his name substituted for that of the decree-holder in the record of the decree and to issue execution. —*Held*, that the District Court was the court competent to execute the decree, as the judgment of the Supreme Court in appeal became the judgment of the District Court, that it was within the discretion of the District Court to execute the decree for the benefit of the assignee; but that in view of the intended appeal to Her Majesty in Council the proper form of order should have been not to substitute the name of the assignee in the record of the decree, but to allow execution in the name of the assignor, due entry being made in the record as to the assignee being allowed to take out execution in his assignor's name [*Cassim Lebbe v. Saraye Lebbe*, 3 C. L. R. 61].

It is discretionary with the court to substitute on the record the assignee of a final decree in place of his assignor. When such substitution is disallowed by the judge, the assignee may resort to the remedy of a fresh action against the judgment-debtor [*Sulymun v. Somnaden*, 3 N. L. R. 20].

The court has a discretion under this section to grant or refuse the application of an assignee of a decree to have his name substituted in the record of the decree for that of the original plaintiff and to have the decree executed, but such discretion should be exercised reasonably and on sufficient material. Non-service of the original summons and decree *nisi* on the defendant is not of itself a good cause for disallowing such an application [*Punchi Appu v. Babanchi*, 2 C. L. R. 177].

There is no prohibition in law against one of several decree-holders assigning his interest under the decree; and the assignee is entitled to execute under this section unless the judgment-debtor can show that such a proceeding is prejudicial to his interest [*Muthanarayana v. Bala Krishna*, 1. L. R. 19 Mad. 306].

If the decree-holder's interest in the property dealt with by the decree and not the decree be assigned, possibly the assignee

should not be put on the record, and the decree should be executed by the decree-holder [*Ram Sahi v. Gaya*, I. L. R. 7 Alla. 107].

Does this section apply to the transfer of a part and not of the whole decree [*Sectaput Roy v. Syud Ali*, 24 W. R. 11 ; *Kishore Chand v. Gisborne & Co.*, I. L. R. 17 Cal. 341].

An oral transfer is not recognised [*Javermal v. Umaji*, I. L. R. 9 Bom. 179 ; *Parrata v. Dijambar*, I. L. R. 15 Bom. 307]. As to the distinction between a purchaser at a sale in execution of a decree and a private assignee, see *Gour Sundar v. Hem Chunder* [I. L. R. 16 Cal. 355].

A judgment-debtor cannot object that the decree has been transferred by assignment to a third party so long as such assignment has not been notified to the court by one of the parties to it, and been duly recognised [*Khetter Mohun v. Ishur Chunder*, 11 W. R. 271].

If the application is sanctioned, then the transferee is entitled to all the privileges of the decree-holder, and to have the decree executed as if the application had been made by the petitioner [*Shamunund v. Sumbhoo*, 7 W. R. 205].

On fair objection by the debtor the court should, under the discretion given by this section, refrain from granting the application for execution, leaving the assignee to his remedy against the assignor [*Rughoo v. Somessur*, 22 W. R. 235].

The fact that there are cross decrees is a good reason for refusing to recognise an assignment of one of them [*Jodoomath v. Ram Buksh*, 8 W. R. 202 ; but see *Krishna Mohini v. Kedernath*, I. L. R. 15 Cal. 446].

Where the whole decree has not been transferred, but only a part, the judgment is so far extinguished, and execution should only issue for the remainder [*Banarasi Dass v. Kuar*, I. L. R. 5 Alla. 27].

340 Every transferee of a decree shall hold the same subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder.

Transferee bound by equities.

Same as section 233 of the Indian Code.

The transferee in execution holds subject to the rights of the judgment-debtor to set off a cross decree in existence at the date of his purchase and in the same court [*Kaim Ali v. Lucky Kant*, 10 W. R. (F.B.) 32].

The "equities" mentioned in this section need not necessarily be equities of the judgment-debtor in the same cause. Hence, where the transferee of a decree in an action applied for execution, *held*, that the judgment-debtor was entitled to set off against

such decree the amount of a decree in his favour in another action against the decree-holder in the former. A decree for costs not yet taxed cannot be said to be a decree capable of execution in terms of explanation 1 of this section [*Virasingam v. Kathiravelu*, 2 N. L. R. 358].

Legal
representa-
tive of
deceased
debtor, how
made liable,

341 If the judgment-debtor dies before the decree has been fully executed, the holder of the decree may apply to the court which passed it, by petition, to which the legal representative of the deceased shall be made respondent, to execute the same against the legal representative of the deceased.

and extent of
liability.

Such representative shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and for the purpose of ascertaining such liability, the court executing the decree may on the application of the decree-holder compel the said representative to produce such accounts as it thinks fit.

Same as section 234 of the Indian Code.

This section does not render a sale of property attached void, which takes place after the death of the original debtor and before his representative is placed on the record [*Stowell v. Ajulhia*, I. L. R. 6 Alla. 255; but see *Krishnayya v. Unnissa*, I. L. R. 15 Mad. 399].

Execution proceedings do not abate like suits [*Gulabdas v. Lakshman*, I. L. R. 3 Bom. 22]; and if subsequent to attachment of immovable property the judgment-debtor dies, the property may be sold without making the legal representative a party [*Sheo Prasad v. Hira Lal*, I. L. R. 12 Alla. 440. See *Ramasami v. Bajinathi*, I. L. R. 6 Mad. 180].

If property has been seized during the lifetime of the judgment-debtor, it then comes into the hands of the law and the seizure does not abate on the death of the judgment-debtor, and for the purpose of proceeding against, and if necessary selling, that property it is not necessary to implead any one as a legal representative [*Abdur v. Shankar*, I. L. R. 17 Alla. 162].

Fiscal may
adjourn sale.

342 The fiscal may in his discretion adjourn a sale, provided that the date to which the sale is adjourned is published in the same manner as was the original notice of sale; and provided also that he report to the court in

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his return to the writ of execution, or sooner, the cause for which the adjournment was made.

343 The court may for sufficient cause stay execution proceedings at any stage thereof, and make order for adjournment of a sale. The application to the court to stay proceedings shall be made by petition, to which all persons interested in the matter of the execution shall be made parties, and no such order shall be made until after payment of all fiscal's fees then due.

Stay of proceedings and adjournment of sale by court.

344 All questions arising between the parties to the action in which the decree was passed, or their legal representatives, and relating to the execution of the decree, shall be determined by order of the court executing the decree, and not by separate action.

All questions arising in execution to be determined by order of court and not by separate action.

See section 244 of the Indian Code.

The questions must arise between parties to an action, and on the record [*Mohendro v. Gopal*, I. L. R. 17 Cal. 769, p. 777].

Plaintiff claimed possession of land with mesne profits from date of dispossession to the date of recovery of possession and obtained a decree for possession with mesne profits up to date of suit—held, a second suit would lie for the subsequent mesne profits [*Mon Mohun v. The Secretary of State*, I. L. R. 17 Cal. 968].

If a decree has been fully satisfied, and the execution proceeding closed, no orders could be passed under this section, and a regular suit will lie [*Fakaruddin v. The Official Trustee*, I. L. R. 10 Cal. 538].

Where an order purporting to be made under this section is passed without jurisdiction a regular suit will, notwithstanding, lie [*Rama Soonderee v. Mudhoo Soodun*, 25 W. R. 156].

This section does not absolutely bar a suit, but prohibits, in a separate suit between the same parties to a decree, any relief being granted which interferes with the conduct of the execution proceedings by the court executing the decree [*Azizan v. Matuk*, I. L. R. 21 Cal. 437].

A person who within the meaning of section 339 is a transferee of a decree is a representative within the meaning of this section, *qua* the decree, of the party to the suit under whom he, immediately or by mesne assignment in writing or by operation of law, has derived title to the decree in the suit [*Badri Narain v. Jai Kishen*, I. L. R. 16 Alla. 483].

Persons who had originally been made parties to a suit, but had been expressly exempted from the operation of the decree,

are not "parties to the suit" within the meaning of this section [*Mukarah v. Hurmat*, I. L. R. 18 Alla. 52].

The term "representative" as used in this section when taken with reference to the judgment-debtor does not mean only his legal representative—that is, his heir, executor, or administrator—but it means his representative in interest, and includes a purchaser of his interest who, so far as such interest is concerned, is bound by the decree [*Ishan v. Beni Madhub*, I. L. R. 24 Cal. 62; *Lalji v. Naul*, I. L. R. 19 Alla. 332].

A suit will lie to set aside a decree and a sale held in execution of such decree when both the sale and the decree are impeached on the ground of fraud [*Abdul v. Mohamed*, I. L. R. 21 Cal. 605].

Procedure
where there
are cross
decrees
between the
parties.

345 If cross decrees between the same parties for the payment of money be produced to the court, execution shall be taken out only by the party who holds a decree for the larger sum, and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum.

If the two sums be equal, satisfaction shall be entered up on both decrees.

Explanation 1.—The decrees contemplated by this section are decrees capable of execution at the same time and by the same court.

Explanation 2.—This section applies where either party is an assignee of one of the decrees and as well in respect of judgment-debts due by the original assignor as in respect of judgment-debts due by the assignee himself.

Explanation 3.—This section does not apply unless—

- (a) The decree-holder in one of the actions in which the decrees have been made is the judgment-debtor in the other and each party fills the same character in both actions; and
- (b) The sums due under the decrees are definite and unconditional.

Illustrations.

- (a) A holds a decree against B for one thousand rupees. B holds a decree against A for the payment of one thousand rupees in case A fails to deliver certain goods at a future day. B cannot treat his decree as a cross decree under this section.

- (b) A and B, co-plaintiffs, obtain a decree for one thousand rupees against C ; and C obtains a decree for one thousand rupees against B. C cannot treat his decree as a cross decree under this section.
- (c) A obtains a decree against B for one thousand rupees. C, who is a trustee for B, obtains a decree on behalf of B against A for one thousand rupees. B cannot treat C's decree as a cross decree under this section.

Same as section 246 of the Indian Code.

A decree obtained against the husband alone cannot be set off against a decree obtained by the husband and wife against the decree-holder ; nor can a decree obtained against a person as administrator be set off against a decree obtained by him personally [*Missinona v. Jayesooria*, 2 S. C. R. 79].

346 When two parties are entitled under the same decree to recover from each other sums of different amounts, the party entitled to the smaller sum shall not take out execution against the other party ; but satisfaction for the smaller sum shall be entered on the decree.

Procedure where parties recover different amounts under same decree.

When the amounts are equal, neither party shall take out execution, but satisfaction for each sum shall be entered on the decree.

Same as section 247 of the Indian Code.

347 In cases where there is no respondent named in the petition of application for execution, if more than one year has elapsed between the date of the decree and the application for its execution, the court shall cause the petition to be served on the judgment-debtor, and shall proceed thereon as if he were originally named respondent therein. Provided that no such service shall be necessary if the application be made within one year from the date of any decree passed on appeal from the decree sought to be executed or from the date of the last order against the party, against whom execution is applied for, passed on any previous application for execution.

Proceedings where one year has elapsed from date of decree.

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See section 248 of the Indian Code.

The petition referred to in this section embraces the written application required by section 224 [*Muttiah v. Meera Lebbe*, 1 S. C. R. 244].

Where the holder of a decree payable by instalments applies for execution on failure of the judgment-debtor to pay an instalment, the debtor is entitled to notice under this section if a year has elapsed between the original decree and the application for execution, even though the instalment became due within a year of such application [*Perichiappa v. Jacolyn*, 3 C. L. R. 91].

Without the notice under this section the execution proceedings are void and of no effect [*Sahdeo v. Ghasiram*, 1 L. R. 21 Cal. 19].

Execution
against
surety.

348 Whenever a person has before the passing of a decree in an original action become liable as surety for the performance of the same or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable in the same manner as a decree may be executed against a judgment-debtor, upon application made by the judgment-creditor to the court for that purpose by a petition to which the person sought to be made liable as surety shall be named respondent.

Substantially the same as section 253 of the Indian Code.

This section applies only where security has been given *before* decree [*Ralaj v. Ramasani*, 1 L. R. 7 Mad. 285]. It applies to cases where a plaintiff may be called upon to give security for costs [*Ram Coomar v. Chunder*, 4 Ind. App. 23; 1 L. R. 2 Cal. 233], and to all suretyships for the due performance of an appellate decree [*Bans Bahadur v. Mogla Begum*, 1 L. R. 2 Alla. 604; *Tenkapa Naik v. Baslingapa*, 1 L. R. 12 Bom. 411. See *contra*, *Radha Pershad v. Phuljuri*, 1 L. R. 12 Cal. 402].

Decree-holder
to certify
payment to
the court.

349 If any money payable under a decree is paid out of court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, he shall certify such payment or adjustment to the court whose duty it is to execute the decree. The judgment-debtor may also by petition inform the court of such payment or adjustment, and apply to the court to issue a notice to the decree-holder to show cause on a day to be fixed by the court why such payment or adjustment

should not be recorded as certified. And if after due service of such notice the decree-holder fails to appear on the day fixed, or having appeared fails to show cause why the payment or adjustment should not be recorded as certified, the court shall record the same accordingly. No such payment or adjustment shall be recognised by any court unless it has been certified as aforesaid.

Substantially the same as section 258 of the Indian Code.

"No such payment shall be recognised," &c.—The effect of these words is to render the certificate under this section the sole admissible evidence of the satisfaction of the decree [*Pitcha Tamby v. Mahamado Khan*, 9 S. C. C. 187].

Under this section the court may, notwithstanding the revival of a judgment, record as certified on the petition of the judgment-debtor any adjustment or payment made before such revival [*Silva v. Podisingho*, 2 S. C. R. 18].

Where a judgment-creditor enters into an agreement with his debtor superseding the decree, he must either have it certified as an adjustment under this section or sue the debtor on his agreement. He is not entitled to a writ under the decree [*The Bristol Hotel Co., Ltd., v. Power*, 3 S. C. R. 168].

Where an application is made by a judgment-debtor under this section the petition must be supported by affidavit or deposition on oath before notice to show cause can be issued [*Kannappa v. Croos*, 3 C. L. R. 69].

Where a judgment-debtor sued his creditor for recovery of moneys overpaid on the decree, *held*, that it was not competent to him to prove payments except as certified under this section [*Konuchamy v. De Silva*, 3 N. L. R. 65].

Oral evidence of payment may be given in a criminal proceeding against the judgment-creditor for fraudulently executing a satisfied decree [*Queen-Empress v. Pillala*, I. L. R. 9 Mad. 101].

The prohibition only extends to courts executing decrees, and not to courts having jurisdiction to try the allegation of the parties on the merits [*Kabyan Singh v. Kanta Prasad*, I. L. R. 13 Alla. 339].

An application by a judgment-creditor to certify a payment out of court is a step in aid of execution [*Tarini Das v. Bishtoo Lal*, I. L. R. 12 Cal. 608].

This section applies only to the case of parties who stand in the relation of judgment-debtor and judgment-creditor at the date of the transaction [*Rama Ayyar v. Sreenivasa*, I. L. R. 19 Mad. 230].

The decree-holder might prove a payment, not certified, to show that the execution of the decree is not barred [*Hurri v. Nasib*, I. L. R. 21 Cal. 542 : *Kishan v. Aman*, I. L. R. 17 Alla. 42].

Payment out of court may, under this section, be certified at any time [*Tukaram v. Babaji*, I. L. R. 21 Bom. 122].

How and to
whom money
paid into
court may be
paid out.

350 Money which in the course of an action or in satisfaction of a decree or order has been paid into, and received by, the court to the separate account of a specified person, or which by an order of court has after receipt been carried to such separate account, may be paid out to the specified person on his *ex parte* application. But in all other cases money in court, whether realised in execution of a decree or not, shall only be paid out on notice to all the parties to the action, or such of them as are interested in the money. And if, before the proceeds of execution have been paid to the party in whose favour the execution issued, notice shall be given to the court of any claim to such proceeds by any other person or persons, the court shall, before making any order for the payment of such proceeds, cause notice to issue to all persons whose claims shall have been notified to the court, as well as to the parties to the action, that the court will on the day specified in the notice proceed to determine the respective rights of the persons claiming such proceeds or any part thereof (form No. 64, second schedule). And on such day or on some other day to which the court may for sufficient cause adjourn the hearing, the court shall proceed to hear and adjudicate upon the claims made, and make such order as the justice of the case may require ; or the court may, if in its opinion any claims cannot be conveniently heard and adjudicated upon in the manner aforesaid, refer the parties to a separate action.

Where the
same
property is
seized in
execution of
decrees of

351 Where property not in the custody of any court has been seized in execution of decrees of more courts than one, the court which shall receive or realise such property and shall determine any claim thereto and any

objection to the seizure thereof shall be the court of highest grade, or, where there is no difference in grade between such courts, the court under whose decree the property was first seized.

more courts
than one.

Same as section 285 of the Indian Code.

The court referred to in this section has the sole power of deciding objections to the seizure, determining claims made to the property, ordering the sale thereof, and receiving the sale proceeds and providing for their distribution under section 352 [see *Badri v. Saran Lal*, I. L. R. 4 Alla. 359].

352 Whenever assets are realised by sale or otherwise in execution of a decree, and more persons than one have, prior to the realisation, applied to the court by which such assets are held for execution of decrees for money against the same judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting the costs of the realisation, shall be divided rateably among all such persons.

Where several
decree-holders
are entitled to
share rateably
in proceeds of
a sale of
debtor's
property.

Provided that, when any property is sold which is subject to a mortgage or charge, or for any other reason remains subject to a mortgage or charge notwithstanding the sale, the mortgagee or incumbrancer shall not as such be entitled to share in any proceeds arising from such sale.

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If all or any portion of the money realised in execution of a decree is in the distribution made under the last preceding section paid to a person not entitled to receive the same, any person who is so entitled may sue such person to compel him to refund the money.

Share of such
proceeds paid
to wrong
person may be
recovered by
action by
person
entitled.

See section 295 of the Indian Code.

Concurrence under this section has place only where the claimants hold decrees for their claims, and have, prior to the realisation of the proceeds, applied to the court for execution of such decrees. The Code has, in this respect, superseded the Roman-Dutch Law regulating the concurrent claims of creditors upon the execution proceeds of a common debtor's property [*Konamalai v. Sivakulanthu*, 9 S. C. C. 203]. But in *Chelliga v. Alwis*, [1. S. C. R. 56] it was held that the Roman-Dutch Law right of a creditor to claim concurrence in the proceeds of a levy

made on the debtor's goods by another creditor has not been put an end to either by legislation or decision.

The creditor claiming concurrence, before he can be admitted to share in the proceeds, is bound to prove the existence of the debt: a judgment is not necessarily conclusive as to the existence of the debt [*ibid*].

Where three plaintiffs in three different cases had judgments against the same defendant, and the same property of the defendant was seized under all three writs, but the Fiscal purported to sell under only one of them, *held*, that the three creditors were entitled to share *pro rata* in the proceeds of the Fiscal's sale [*Warren v. McMillan & Co.*, 1 S. C. R. 86].

Claims in concurrence under the Roman-Dutch Law procedure have always been entertained by our courts notwithstanding that an insolvency procedure was provided by Ordinance No. 7 of 1853. Such claims must, until legislative interference on the subject, continue to be disposed of according to the old practice. Under the old practice, when a creditor had made a levy a second creditor might claim concurrence in the proceeds, at all events, unless and until those proceeds had got home to the hands of the execution-creditor. When the execution-purchaser was not the plaintiff, claims of concurrence were not usually entertainable after the proceeds of the levy had been paid over to the execution-creditor. When the plaintiff was the purchaser, and the price fell short of the amount due to him, he, as a matter of convenience, was allowed credit for his purchase money. It was a question in such a case at what point the plaintiff's purchase money was to be deemed to have got home [*Hadjar v. Hadjie*, 1 S. C. R. 159].

The mere seizure by the Fiscal of money due to a judgment-debtor in the hands of a third party is not "realisation" of the asset within the meaning of this section. It is open to other creditors who have applied at that stage for execution of money decrees against the same judgment-debtor to claim in concurrence [*Soyza v. Werukoon*, 2 C. L. R. 178].

A specific mortgage of movables by writing, when the goods are retained by the owner, is not such a mortgage or charge as would continue to attach to the goods after a judicial sale thereof, within the meaning of this section. The proceeds of sale of such goods, less charges and Fiscal's fees, represent the goods as long as they have not been appropriated by an order of court to the execution-creditor [*Meera Saibo v. Muttu Chetty*, 3 C. L. R. 37].

"Realised in execution."—These words do not apply to money paid into court after seizure, but before sale on account of one of the judgment-creditors [*Gopal Dai v. Chummi*, I. L. R. 8 Alla. 67]; nor to money paid by a judgment-debtor under arrest

[*Purshotam v. Mahant*, I. L. R. 6 Bom. 588] ; but a debt seized and paid into the hands of the Fiscal is within this section [see *Sorabji v. Govind*, I. L. R. 16 Bom. 91]; and so are sums paid into court as purchase money before the sale is confirmed [*Vishvanath v. Vir Chand*, I. L. R. 6 Bom. 16].

353 Every order made by a court, in any action or proceeding between parties, for payment of money not being a fine, shall have the effect of a decree for the payment of money, and on default of payment according to its terms shall be enforceable upon the application of the party at whose instance it was made in like manner as a decree for money.

Order for
payment of
money
enforced
as a decree.

An interlocutory order for costs is an order for the payment of money under this section, and if the costs exceed Rs. 200 writ against person may be sued out for their recovery even before the termination of the case [*Pullenayegam v. Pullenayegam*, 2 C. L. R. 82].

354 In the event of an order being made by the civil court under the provisions of this Ordinance for the payment of a fine, and in the event of the fine not being paid into court at the time appointed therefor by the order, the amount of the said fine shall be levied by the fiscal from the property of the person against whom the order was made ; and the court shall forthwith, on the occurrence of the default, of its own motion issue its writ or precept to the fiscal for this purpose.

Fine imposed
by civil court
how to be
levied.

Of Service of Process.

355 Writs or warrants to levy money or to take any person in arrest, or to detain any person in custody, or to deliver possession of property, or for the sequestration of any property, shall usually be directed to the fiscal of the province or district in which the court issuing the writ or warrant is situate ; but any such writ or warrant may be issued to any headman, constable, or officer of police empowered to act within such province or district. And where any such writ or warrant is issued by the Supreme Court, or by any

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Writs or
warrants to
be usually
issued to the
fiscal for
execution,

court within the local limits of whose jurisdiction the party against whom it is issued does not actually and voluntarily reside, or carry on business, or personally work for gain, or is not possessed of property sufficient to satisfy the same, such writ or warrant shall be issued to the fiscal of any province or district within which such party does actually and voluntarily reside or carry on business, or personally work for gain, or is possessed of such property.

and other
processes for
service.

356 All processes of court not being writs, or warrants directed to the fiscal or other person for execution, and all notices and orders required by this Ordinance to be given to or served upon any person, shall unless the court otherwise directs be issued for service to the fiscal of the province or district in which the court issuing such processes, notices, or orders is situate, under a precept of that court as is hereinbefore provided for the case of the summons to the defendant in an action. And the enactments of the sections of this Ordinance from section 59 to section 70, both inclusive, relative to the service of such summons shall apply, so far as is practicable, to the service of such processes, notices, and orders.

Fiscal to
execute and
serve
processes of
courts any-
where in the
island.

357 It shall be the duty of every fiscal, upon receiving any writ, or warrant, or precept directed to him by any court, by himself or by his officers, to execute such writ or warrant, and to serve every process, notice, or order conveyed to him under such precept according to the exigency of the writ, warrant, or precept.

Proceedings
against fiscal
for contempt,
&c.

358 All proceedings for attachment, contempt, or otherwise against a fiscal or deputy fiscal for neglect or refusal to serve process or to comply with any order or direction of the court in connection therewith shall, where such fiscal or deputy fiscal is the fiscal or deputy fiscal of a district other than that of the court issuing such process, order, or direction, be referred by such

court to the court possessing similar jurisdiction within the district of such fiscal or deputy fiscal, and shall be dealt with by the latter court as if such neglect or refusal related to its own process or orders.

359 It shall be the duty of every headman, constable, or officer of police, upon receiving any writ or warrant or precept directed to him by any court, to execute such writ or warrant and to serve every process, notice, or order conveyed to him under such precept according to the exigency of the writ, warrant, or precept in any place within the district or division in which such headman, constable, or officer is empowered to act.

Headman or constable to execute or serve processes in his own limits only.

360 It shall be competent to any fiscal to whom any writ, warrant, or precept has been directed under the foregoing sections, and to the fiscal's officer to whom the fiscal may have entrusted such writ, warrant, or precept for execution, to endorse thereon the name of any headman, constable, or officer of police empowered to act within such fiscal's province or district, or the name of any other fiscal; and such endorsement shall operate—

Endorsement of process by fiscal.

(a) In the case of a headman, constable, or officer of police to constitute the person whose name is endorsed an officer of the fiscal for the purpose of executing such writ, or warrant, or precept;

(b) In the case of the fiscal, to impose upon the fiscal whose name is so endorsed the like duty of executing the endorsed writ, warrant, or precept as he would be under, by virtue of section 357, if such writ, warrant, or precept were directed to him immediately by the court from which it issued.

361 Every fiscal and fiscal's officer shall within his province or district, and every headman, constable, or officer of police shall, within the local limits in

Duty of every fiscal to assist.

which he is empowered to act, afford his aid and assistance to any one charged under the foregoing sections with the duty of executing any writ or warrant, or of serving any process, notice, or order of court.

Every writ or process to be valid for the whole island.

362 Every mandate, writ, warrant, precept, or other process issuing from the Supreme Court, or from any district court or court of requests shall have full force and validity in every place throughout the island; and every person charged under the foregoing sections with the duty of executing any such process shall be protected thereby from civil liability for loss or damage caused by, or in the course of, or immediately consequential upon, the execution of such process by him, or in the case of the fiscal by his officers, except when the loss or damage for which the claim is made is attributable to any fraud, gross negligence, or gross irregularity of proceeding, or gross want of ordinary diligence or abuse of authority on the part of the person executing such process.

Protection of officer executing the same.

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Provided that no action shall be maintainable against any person charged as aforesaid with the duty of executing any such process in respect to his execution thereof, unless previous notice in writing distinctly setting forth the grounds of such action shall have been given to him by or on behalf of the plaintiff one month at least before the commencement of such action, and unless such action shall be brought within nine months after the cause of action shall have arisen. And provided further, that it shall be lawful for the person to whom such notice of action has been given at any time before the commencement of such action to tender amends to the party aggrieved, and if the same be refused to plead such tender, at the same time paying into court for the use of the plaintiff the amount so tendered, and if the court by its judgment in the action shall hold that the amount so tendered and paid

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into court is sufficient amends for the party aggrieved, the decree shall be passed in favour of the plaintiff for such amount, but he shall be condemned to pay all costs.

363 The seizure or sale of property, which does not belong to the person whose property is authorised by a writ of levy to be seized and sold, shall not be deemed to be an act done by or in the course of, nor an immediate consequence of, the execution of such writ within the meaning of the first paragraph of the last preceding section. But no person charged as aforesaid shall be liable in damages for any such seizure or sale, if the same shall be shown to have been effected under the *bonâ fide* belief that the property did belong to the person whose property is authorised to be seized or sold.

What acts not within last section.

364 Unless otherwise in this Ordinance enacted the precept of the court to the fiscal directing the service of any process, order, or notice, or other document, not amounting to a writ to levy money, or to take any person in arrest or to detain any person in custody, or to deliver possession of property, shall be in the form 17 given in the schedule II. hereto.

Form of precept.

365 Process in civil cases, whether at the suit of the Crown or individuals, shall not be served or executed between the period of sunset and sunrise; nor on a Sunday, Good Friday, or Christmas Day, nor on any minister of religion while performing his functions in any place of public worship, nor upon any individual of any congregation during the performance of public worship at any such place.

When process may not be served.

366 The outer door of any dwelling house shall not be forced open in order to seize the person under civil process issued at the suit of a private individual, excepting such person shall have escaped or shall have been rescued after having been duly arrested.

Outer door not to be forced.

In effecting seizure of movable property inner door may be opened.

367 If the person executing any process under this Ordinance, directing or authorising seizure of movable property, has obtained entrance into a house or other building, he may unfasten and open the door of any room in which he has reason to believe any such property to be.

Person executing process always to have writ with him or copy.

368 The person employed in carrying into effect any process of execution against either person or property shall always have with him the writ, warrant, or mandate of execution, or a copy of the same authenticated by the fiscal or deputy fiscal, which shall, if required, be produced and shown to the party against whom, or against whose property, it is sought to be put in force.

Body of person to be arrested must be seized or touched.

369 In all civil cases where process of execution may issue against the person of a party, it shall be necessary, in order to constitute an arrest, that the body of the person to be arrested shall be actually seized or touched by the officer executing the process, unless such person express his acquiescence in the arrest without being so seized or touched.

Fiscal's return of writ or precept.

370 Every fiscal or deputy fiscal shall, on the receipt of any process, note thereon the day he received the same, and on the service or execution thereof the date and mode of such service or execution.

When the writ of execution or precept for service has been carried into effect, or on the day appointed in the writ or precept for the return thereof, whichever date shall first occur, the fiscal or deputy fiscal shall return the writ or precept to the court from which it issued with his report of what has been done under it.

The Fiscal entrusted with the service of process has the whole of the returnable day to make return to the process, and is not in default until the expiration of that day [*Palaniandy v. Rangasamy*, 2 C. L. R. 122].

371 The report of the fiscal or deputy fiscal constituting his return to the writ of execution or to the precept for service of any process shall be fair written and shall state concisely the mode in which the process has been served, or the steps which have been taken to effect service; and shall be accompanied by an affidavit made by the officer charged with the duty of executing the process, which affidavit shall set out the facts of the service effected, or of the endeavour made by the officer to effect the service. The process and the affidavit shall be attached to the report as exhibits, and shall be referred to therein by means of a distinguishing letter or other mark put upon them, each initialled and dated by the fiscal.

Report to be accompanied by affidavit to be attached as an exhibit.

372 The fiscal or deputy fiscal, or other person specially appointed by the Governor in that behalf, is hereby authorised to administer the oath or affirmation which is requisite to the making of the affidavit in the last section mentioned. And every officer who makes a false statement of fact in any such affidavit commits (in addition to any offence of which under the provisions of the Ceylon Penal Code he may by so doing be guilty) an offence which is punishable as contempt of court.

Power of fiscal or other person to administer oath therefor.

The making of a false statement of fact by an officer charged with the execution of process in his affidavit of service is an offence punishable as contempt of court under this section [*The Queen v. Fernando*, 2 S. C. R. 46].

OF SUMMARY PROCEDURE.

373 Every application to the court, or action, of summary procedure shall be instituted upon a duly stamped written petition presented in open court by the applicant; or, in the court of requests, may be made orally by the applicant in person, whose statement then being reduced into writing by the court or by some

PART 2.

Chapter 24.

Summary procedure by petition.

officer specially deputed by the court for that purpose, shall, upon the requisite stamp being furnished and affixed on behalf of the applicant, if a stamp be necessary, be deemed and treated as a written petition.

The "summary procedure" provided by this Chapter can only be adopted in cases to which it is expressly made applicable by the Code [*Pitche Bawa v. Meera Lebbe*, 2 C. L. R. 174].

This section does not imply that if the law does not require a stamp in a particular proceeding by way of summary procedure, a petition in such matter should be stamped [*In re the Guardianship of Richard & James Henry*, 1 S. C. R. 15 ; 2 C. L. R. 2].

Form of
petition.

374 The petition shall be distinctly written in the English language, upon good and suitable paper, and shall contain the following particulars :

- (a) The name of the court and date of presenting the petition.
- (b) The name, description, and place of abode of the petitioner or petitioners.
- (c) The name, description, and place of abode of the respondent or respondents.
- (d) A plain and concise statement of the facts constituting the ground of the application and its circumstances, and of the petitioner's right to make it. Such statement shall be set forth in duly numbered paragraphs.
- (e) A prayer for the relief or order which the petitioner seeks.

If incidental
to an action
petition to be
entitled
therein.

375 If the application is instituted in the course of, or as incidental to, a pending action, whether of regular or summary procedure, the petition shall be headed with a reference to its number in the court, and the names of the parties thereto, and shall be filed as part of the record of such action, and all proceedings taken and orders made on such petition shall be duly entered in the journal required to be kept by section 92.

376 With the petition, and so far as conveniently can be attached thereto, shall be exhibited such affidavits, authenticated copy records, processes, or other documentary evidence as may be requisite to furnish *prima facie* proof of the material facts set out or alleged in the petition, or the court may in its discretion permit or direct the petitioner to adduce oral evidence before the court for this purpose, which shall be taken down by the court in writing.

Affidavits and exhibits to be attached to petition.

377 If the court is satisfied on the evidence exhibited or adduced that the material facts of the petition are *prima facie* established, and is of opinion that on the footing of these facts the petitioner is entitled to the remedy, or to the order in his favour, for which the petition prays, or any part thereof, then the court shall accordingly make either—

If grounds are sufficient, order may be *nisi*, or interlocutory.

(a) An order *nisi*, conditioned to take effect in the event of the respondent not showing cause against it on a day appointed by the order for that purpose; or

(b) An interlocutory order appointing a day for the determination of the matter of the petition, and intimating that the respondent will be heard in opposition to the petition if he appears before the court for that purpose on the day so appointed.

378 In the alternative marked (a) the order *nisi* may comprise an order against the respondent, or any of the respondents, to pay the costs of the petitioner.

Order as to costs.

379 In either of the alternatives (a) and (b) of section 377 the order made shall be put into writing, and shall contain a prefatory recital of the petition and of the exhibits and other evidence adduced in support thereof. And a copy of the order together with a copy of the petition shall be served upon the respondent by

Form of order.

Service on respondent.

the fiscal in the manner and subject to the rules hereinbefore prescribed for the service of the summons in a regular action.

Where a copy of the petition had not been served as required by this section on a respondent, the District Court, on objection taken by the respondent, enlarged the time for showing cause and directed a copy of the petition to be served in the meantime, *held*, that the court had a discretion to enlarge the time instead of discharging the order, and that the respondent was entitled to his costs of his opposition [*Fernando v. Fernando*, 2 C. L. R. 181].

If grounds
are insuffi-
cient, petition
to be refused.

380 If the court is not satisfied on the evidence exhibited or adduced that the material facts of the petition are *primâ facie* established, or is of opinion that on the footing of those facts the petitioner is not entitled to the relief which he asks, then in either case the court shall refuse the petition.

Petition and
order thereon
to be filed.

381 The petition with its exhibits, adduced evidence, and the order made thereon, shall be filed in court whether the order is in the alternative (a) or (b), section 377, or is an order refusing the petition.

Non-appear-
ance of
petitioner on
day appointed.

382 If on the day appointed in an order made under section 377 for the determination of the matter of the petition, the petitioner does not appear before the court either in person or by proctor to support the petition, the court shall dismiss the petition, and shall have power to make such order for the payment of costs by the petitioner to the respondent as to the court shall seem just.

When court
may make
order *nisi*
absolute.

383 If on such day the petitioner appears, and the respondent does not appear, and if the court is satisfied by the affidavit of the serving officer, stating the fact of the service, or by oral evidence, that the order has been duly served upon the respondent in time reasonably sufficient to enable him to appear, then, if the order is an order *nisi* made under (a) of section 377, the court shall make it absolute, and shall

pass no other order adverse to the respondent; but otherwise it shall make such order within the prayer of the petition as it shall consider right on the facts proved. Provided, however, that in the latter case the court shall make no order to pay costs against the respondent, except in cases where the prayer of the petition expressly asks for the costs of the application, and the court thinks it fit that the respondent should pay them. Nothing in this section shall prevent the court from dismissing the petition at this stage in the absence of the respondent, if it sees reason to think that the order ought not to have issued in the first instance.

Proviso.

384 If on such day both the petitioner and the respondent appear, the proceedings on the matter of the petition shall commence by the respondent in person, or by his proctor, stating his objections, if any, to the petitioner's application; and the respondent shall then be entitled to read such affidavits or other documentary evidence as may be admissible, or by leave of the court to adduce oral evidence in support of his objections, or to rebut and refute the evidence of the petitioner, provided that no affidavit or other documentary evidence shall be so read without express leave of court, unless a copy of the document shall have been served on the petitioner or his proctor at least forty-eight hours before the day when the matter of the petition comes on to be heard and determined; and the oral evidence shall be taken down in writing by the judge.

Proceedings where both parties appear.

Proviso.

385 In the event of the respondent stating objections to the application, and not otherwise, and after the respondent's evidence, if any, shall have been read or given, the petitioner shall be entitled by way of reply to comment upon the respondent's case.

Right to reply.

Additional
evidence
when
admitted.

386 When the respondent's evidence has been taken, it shall be competent to the court, on the request of the petitioner, to adjourn the matter to enable the petitioner to adduce additional evidence; or, if it thinks necessary, it may frame issues of fact between the petitioner and respondent, and adjourn the matter for the trial of these issues by oral testimony. And on the day to which the matter is so adjourned the additional evidence shall be adduced, and the issues tried in conformity with, as nearly as may be, the rules hereinbefore prescribed for the taking of evidence at the trial of a regular action.

Final order.

387 The court, after the evidence has been duly taken and the petitioner and respondent have been heard either in person or by their respective proctors or recognised agents, shall pronounce its final order in the matter of the petition in open court, either at once or on some future day, of which notice shall be given in open court at the termination of the trial.

Endorsement
on order *nisi*.

388 The final order so pronounced may be endorsed on the order *nisi* or on the interlocutory order, as the case may be.

Proviso.

In the case of the order *nisi*, the final order, if endorsed, will be simpliciter either in the shape of "order discharged" or of "order made absolute." Provided that an order *nisi*, if it consists of separable parts, may be discharged in part and made absolute in part; and nothing herein enacted shall prevent any order being made by consent of the petitioner and respondent on the footing of the order *nisi*.

In the case of the interlocutory order, the court may make such order within the prayer of the petition as it shall consider right on the facts proved, and it may make any such order upon the petitioner and

respondent for the payment of costs as to the court shall seem just.

389 No appeal by a respondent shall lie against any final order which has been made, in the case of the respondent's non-appearance, on the footing of either an order *nisi* or an interlocutory order in the matter of a petition; but it shall be competent to the court, within a reasonable time after the passing of such order, to entertain an application in the way of summary procedure instituted by any respondent against whom such order has been made, to have such final order set aside upon the ground that the applicant had been prevented from appearing after notice of the order *nisi* or interlocutory order by reason of accident or misfortune, or that such order *nisi* or interlocutory order had never been served upon him. And if the ground of such application is duly established to the satisfaction of the court, as against the original petitioner, the court may set aside the final order complained of upon such terms and conditions as the court shall consider it just and right to impose upon the applicant; and upon the final order being so set aside the court shall proceed with the hearing and determination of the matter of the original petition as from the point at which the final order so set aside was made.

Final order made on non-appearance of respondent, not appealable, but may be set aside.

390 In an application, or action, of summary procedure the persons, petitioning or respondent, are the parties to the action. Parties.

391 On the institution of an application of summary procedure which is not made in, or incidental to, any already pending action, the court shall commence and keep a journal entitled as of the matter of the application, according to the rules prescribed in section 92, and this journal so kept shall be the record of the matter of the application. Journal.

PART 3.

INCIDENTAL PROCEEDINGS.

Chapter 25.

*Of the Continuation of Actions after Alteration
of a Party's Status.*

On death of a party action does not abate if right to sue survives.

392 The death of a plaintiff or defendant shall not cause the action to abate if the right to sue on the cause of action survives.

This section is the same as section 361 of the Indian Code.

After judgment the action does not abate, but the benefit of the judgment goes to the legal representative of the person obtaining it [*Muhammed v. Khushalo*, I. L. R. 9 Alla. 131].

On death of one out of more plaintiffs or defendants than one, if right to sue survive to or against the rest, action to proceed.

393 If there be more plaintiffs or defendants than one and any of them dies, and if the right to sue on the cause of action survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the court shall, on application in the way of summary procedure, make an order to the effect that the action do proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

This section is substantially the same as section 362 of the Indian Code.

In an action for land by several plaintiffs, where the first plaintiff died intestate *pendente lite*, and the surviving plaintiffs who were the sole heirs of the deceased plaintiff became between them the owners of the entirety of the land which was the subject-matter of the action, *held*, that under this section the surviving plaintiffs could continue the suit, not as suing on behalf of the deceased plaintiff or his estate, but on their own account for recovering property which was entirely their own [*Fernando v. Perera*, 1 C. L. R. 38].

If, on death of one of several plaintiffs, the right to sue survives to the rest jointly with legal representative of deceased.

394 If there are more plaintiffs than one, and any of them dies, and if the right to sue does not survive to the surviving plaintiff or plaintiffs alone, but survives to him or them and the legal representative of the deceased plaintiff jointly, the court may cause the legal representative, if any, of the deceased plaintiff to

be made a party, and shall thereupon cause an entry to that effect to be made on the record and proceed with the action.

legal
representa-
tive may be
made
plaintiff.

For the purposes of this chapter legal representative shall mean an executor or administrator, or in the case of an estate below the value of one thousand rupees the next of kin who have adiated the inheritance.

Substantially the same as section 363 of the Indian Code.

This section does not apply to proceedings in execution of decree [*Golab Dass v. Lakshman*, I. L. R. 3 Bom. 221].

395 In case of the death of a sole plaintiff or sole surviving plaintiff the legal representative of the deceased may, where the right to sue survives, apply to the court to have his name entered on the record in place of the deceased plaintiff, and the court shall thereupon enter his name and proceed with the action.

On death of
sole plaintiff,
legal repre-
sentative may
be substi-
tuted,

Same as section 365 of the Indian Code.

An application under this section must be made in the manner indicated in section 91. Section 405 does not apply to it, and no petition by way of summary procedure is necessary [*Abeywardene v. Markar*, 1 S. C. R. 192 ; 2 C. L. R. 76].

The executor of a deceased plaintiff, purporting to act under this section, applied by motion, on rule served on the defendant to show cause to the contrary, that he (the executor) be made a party on the record in the room of the deceased plaintiff, and that the judgment be revived, and writs issued, *held*, that he was not entitled to succeed (1) because there was no provision in the Code for reviving judgments ; (2) because, before an application to issue execution on a decree could be maintained, there must be a plaintiff on the record, and here there was no plaintiff at the time of the application ; and (3) because the motion did not set out the particulars that under the Code should be embodied in an application for execution [*ibid*].

The application under this section may include in one petition a prayer for the substitution of the next of kin as plaintiffs and the appointment of a "next friend" of the next of kin who are minors [*Don Louis v. Bastian*, 2 C. L. R. 137].

The words "legal representative" in this section must, where there are more than one legal representative, be read in the

plural. Hence, where a sole appellant died leaving three legal representatives, *held*, that all should be brought upon the record as appellants, or, if any refused to join as appellants, they should be brought as respondents [*Ghamandi v. Amir Begam*, I. L. R. 16 Alla. 211].

This section presupposes that a party claiming to represent a deceased plaintiff is his legal representative, but if the representative character is denied or when two or more persons claim it, the procedure prescribed by section 397 should be followed [*Oula v. Beepathee*, I. L. R. 17 Mad. 209].

or action may
be declared to
abate.

396 If no such application be made to the court by any person claiming to be the legal representative of the deceased plaintiff, the court may pass an order that the action shall abate, and award to the defendant the costs which he may have incurred in defending the action, to be recovered from the estate of the deceased plaintiff; or the court may, if it think proper, on the application of the defendant, and upon such terms as to costs or otherwise as it thinks fit, pass such other order as it thinks fit for bringing in the legal representative of the deceased plaintiff, or for proceeding with the action in order to a final determination of the matter in dispute, or for both those purposes.

See section 366 of the Indian Code.

In case of
dispute, court
to decide who
is legal
representa-
tive.

397 In the event of any dispute arising as to who is the legal representative of a deceased plaintiff, it is competent to the court either to stay the action until the question has been decided in another action, or to decide at once, as between the parties before it, who shall be admitted to be such legal representative for the purpose of prosecuting the action. And this question shall in such case be dealt with and tried by the court as an issue preliminary to the trial of the merits of the action.

Substantially the same as section 367 of the Indian Code.

398 If there be more defendants than one, and any of them die before decree and the right to sue on the cause of action does not survive against the surviving defendant or defendants alone, and also in case of the death of a sole defendant, or sole surviving defendant, where the right to sue survives, the plaintiff may make an application to the court, specifying the name, description, and place of abode of any person whom he alleges to be the legal representative of the deceased defendant, and whom he desires to be made the defendant in his stead. The court shall thereupon, on being satisfied that there are grounds therefor, enter the name of such representative on the record in the place of such defendant, and shall issue a summons to such representative to appear on a day to be therein mentioned to defend the action, and the case shall thereupon proceed in the same manner as if such representative had originally been made a defendant, and had been a party to the former proceedings in the action

Of substitution of legal representative of deceased defendant.

Provided that the person so made defendant may object that he is not the legal representative of the deceased defendant, or may make any defence appropriate to his character as such representative. Proviso.

The legal representative of a deceased defendant may apply to have himself made a defendant in place of the deceased defendant, and the provisions of this section, so far as they are applicable, shall apply to the application and to the proceedings and consequences ensuing thereon.

See section 368 of the Indian Code.

The mere substitution of a defendant under this section does not make him liable to the extent of a judgment obtained before he was on the record. If a plaintiff wishes to bind substituted defendants to the extent of the property of their ancestor which may have come to their hands, he should proceed regularly against them, and obtain a decree for that purpose [*Marikar v. Perera*, 1 S. C. R. 17].

A suit having been dismissed, plaintiff appealed. Defendant died, and his death was notified to the court, but plaintiff did not attempt to make parties the heirs of the deceased and a decree was given against A's estate—*Held*, the decision must be set aside [*Monee Lal v. Fuzul Hossein*, 14 W. R. 337]; and where the sole defendant in a suit dies before a decree, a decree passed against him on the supposition that he is alive cannot be executed [*Roop Narain v. Ramayjee*, 3 Cal. L. R. 192].

The case proceeds as if the representative had originally been made a defendant. Therefore, if plaintiff loses the action after application, he must pay full costs [*Benge v. Swain*, 23 L. J. C. P. 182].

This section does not apply to the case of the death of a judgment-debtor in execution [*Stowell v. Ajudhia*, I. L. R. 6 Alla. 255].

Action not
abated by
marriage of
female party.

399 The marriage of a female plaintiff or defendant shall not cause the action to abate, but the action may, notwithstanding, be proceeded with to judgment; and where the decree is against a female defendant, it may thereupon be executed against her alone.

If the case is one in which the husband is by law liable for the debts of his wife, the decree may, with the permission of the court, be executed against the husband also; and in case of judgment for the wife, execution of the decree may, with such permission, be issued upon the application of the husband where the husband is by law entitled to the subject matter of the decree.

Same as section 369 of the Indian Code.

Where a person died during the progress of an action, his wife was brought on the record, and judgment given against her, which was affirmed on appeal. Between the original and final judgment she married again. It was held that the decree could not be executed against the second husband [*Bindabun v. Mackintosh*, 9 W. R. 442].

Effect of
bankruptcy.

400 The bankruptcy or insolvency of a plaintiff in any action which his assignee might maintain for the benefit of his creditors shall not bar the action, unless such assignee declines to continue the action and to give security for the costs thereof, within such time as the court may order.

Substantially the same as paragraph 1 of section 370 of the Indian Code.

This and the section next following apply to actions pending when the bankruptcy or insolvency occurs [*Stanton v. Collier*, 23 L. J. Q. B. 116].

401 If the assignee neglects or refuses to continue the action and to give such security within the time so ordered, the defendant may apply for the dismissal of the action on the ground of the plaintiff's bankruptcy or insolvency, and the court may dismiss the action and award to the defendant the costs which he has incurred in defending the same, to be proved as a debt against the plaintiff's estate.

When assignee does not continue action.

Same as paragraph 2 of section 370 of the Indian Code.

This section, of course, applies only to actions pending when a bankruptcy or insolvency occurs [see *Stanton v. Collier*, 23 L. J. Q. B. Bom. 116].

402 If a period exceeding twelve months in the case of a district court, or six months in a court of requests, elapses subsequently to the date of the last entry of an order or proceeding in the record without the plaintiff taking any step to prosecute the action where any such step is necessary, the court may pass an order that the action shall abate.

When court itself may order action to abate.

It is irregular to order a case to be "struck off" owing to lapse of the periods mentioned in this section. Where a case was ordered to be struck off, *held*, that section 403 did not apply, and that the order was no bar to a fresh action on the same cause of action [*Siriwardene v. Loku Banda*, 1 S. C. R. 218 ; 2 C. L. R. 99].

Although an order that the case be "struck off" the roll is not the proper order under this section, yet such an order would operate in fact until the case is restored to the roll. The proper course in such a case is to move for a summons to issue on the opposite party to show cause, if any, against an application to have the case restored to the roll [*Markar v. Bawa Lebbe*, 1 S. C. R. 240].

In the case of a judgment against more than one defendant, issue of process or other causes which are operative against one defendant are also effectual to keep the judgment alive against the other defendants [see *Weerappa v. Meera Lebbe*, 1 C. L. R. 55].

Plaintiff in May, 1891, when the defendant was absent from Ceylon, commenced an action for the price of goods sold, but took no steps to serve the summons out of the jurisdiction, and in 1892 the action was ordered to abate under this section. The defendant having returned to Ceylon, the order of abatement was set aside and summons served on him—*Held*, that in these circumstances the action must be taken to have commenced, *quoad* the period of limitation, from the date when the order of abatement was set aside [*Murugupillai v. Muttelingan*, 3 C. L. R. 92].

Where in a partition suit an interlocutory decree under section 4 of the Partition Ordinance [No. 10 of 1863] is not proceeded with, the court may apply to it this section and clear the roll of the action [*Peris v. Perera*, 1 N. L. R. 362].

An order of abatement under this section would be a bar to a fresh suit on the same cause of action. Settlement of an action would be a complete bar to the institution of a fresh action on the same course and between the same parties [*Ponampalam v. Canagasabay*, 2 N. L. R. 23].

An order of abatement under this section should not be entered by the court *ex mero motu*, but on application by the defendant on due notice to the plaintiff [*Fernando v. Peris*, 3 N. L. R. 77].

When on the trial date of a case it appeared to the court that one of the plaintiffs was dead, the proper order was not to strike the case off the roll, but to postpone it to such a date as would suffice for representation to be raised to the deceased [*Fernando v. Peris*, 3 N. L. R. 77].

No fresh action to be brought where action has abated; but court may set aside order.

403 When an action abates or is dismissed under this chapter, no fresh action shall be brought on the same cause of action.

But the plaintiff or the person claiming to be the legal representative of a deceased or insolvent plaintiff may, within such period of time as may seem to the court under the circumstances of the case to be reasonable, apply for an order to set aside the order for abatement or dismissal; and if it be proved that he was prevented by any sufficient cause from continuing the action, the court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

Substantially the same as section 371 of the Indian Code.

In India, the application under the corresponding section of the Indian Code is to be made within sixty days from the date of the order for abatement or dismissal—Act. XV. of 1877, Sch. II., Art. 171c.

This section does not apply to a case in which a defendant or respondent has died, but to the case only in which the plaintiff or appellant has died or become insolvent [I. L. R. 7 Mad. 196 ; I. L. R. 9 Bom. 275].

404 In other cases of assignment, creation, or devolution of any interest pending the action, the action may, with the leave of the court, given either with the consent of all parties or after service of notice in writing upon them, and hearing their objections, if any, be continued by or against the person to whom such interest has come, either in addition to or in substitution for the person from whom it has passed, as the case may require.

Continuation of action in other cases of assignment of party's interest.

Same as section 372 of the Indian Code.

Where, in an action, there is a counterclaim by the defendant, the assignee, pending the action of the plaintiff's interest in it, cannot claim to be substituted as plaintiff on the record in respect of the plaintiff's claim only. The defendant is entitled to have the whole of the counterclaim adjudicated upon in the one action [*Fry v. Vanderspar*, 9 S. C. C. 207].

The words "pending the action," as used in this section, mean "before final decree" [*Gooneratne v. Perera*, 2 N. L. R. 185].

There should be no final order in the case [I. L. R. 5 Cal. 731].

All parties whose interests may be attached, such as purchasers or assignees *pendente lite*, should be added as parties [*Ahmedbhai v. Vulleebhai*, I. L. R. 8 Bom. 323].

This action does not apply to any assignment, creation, or devolution of any interest after the passing of the decree. It does not apply to execution proceedings [*Raynor v. Mussoorie Bank*, I. L. R. 7 Alla. 681].

An assignee or purchaser of a decree takes it subject to the right of set-off [*Opendro Mohun v. Poorno Chunder*, 19 W. R. 85].

The cases of assignment contemplated by this section are those in which "the person to whom such interest has come" is on the same side of the suit as "the person from whom it has passed" [I. L. R. 5 Alla. 209].

Applications
under this
chapter how
to be made.

405 The application under section 398 may be made *ex parte*, but in all other applications for the exercise of the discretion of the court under this chapter all the parties to the action, not being the applicants, or such of them as may be affected by the order sought, must be made respondents on the face of the application.

Chapter 26.

Of the Withdrawal and Adjustment of Action.

Withdrawal
and adjust-
ment of
action.

406 If, at any time after the institution of the action, the court is satisfied on the application of the plaintiff (*a*) that the action must fail by reason of some formal defect, or (*b*) that there are sufficient grounds for permitting him to withdraw from the action or to abandon part of his claim with liberty to bring a fresh action for the subject-matter of the action, or in respect of the part so abandoned, the court may grant such permission on such terms as to costs or otherwise as it thinks fit.

If the plaintiff withdraw from the action, or abandon part of his claim, without such permission, he shall be liable for such costs as the court may award, and shall be precluded from bringing a fresh action for the same matter or in respect of the same part. Nothing in this section shall be deemed to authorise the court to permit one of several plaintiffs to withdraw without the consent of the others.

Same as section 373 of the Indian Code.

The power of a court to dismiss or allow the withdrawal of an action, with liberty to re-institute the case on the same cause, can be used only on sufficient grounds set forth in the order itself [*Fernando v. Fernando*, 3 N. L. R. 99].

This action applies to a suit at any stage, whether in the Original or Appellate Courts, and even to proceedings in execution [*Gunga Ram v. Data*, I. L. R. 8 Alla. 82].

After an action has been referred to arbitration and the case has not been withdrawn from the arbitrators, a judge has no jurisdiction to allow a withdrawal *ex parte* [*Sheoambarr v. Deedat*, I. L. R. 9 Alla. 168].

The effect of withdrawing an appeal, no matter what the terms of the compromise may be, is that the decision of the lower court is *res judicata* on the points raised in it [*Vythilinga v. Vijayaltammal*, I. L. R. 6 Mad. 43]; and its decree can be executed [*Patloji v. Ganu*, I. L. R. 15 Bom. 370].

No order under this section should be passed without notice to the opposite party [*Kalian Singh v. Lakraj*, I. L. R. 6 Alla. 211].

In India the order permitting withdrawal with liberty, &c., is not appealable [I. L. R. 6 Alla. 211].

This section and section 46 [corresponding to section 54 of the Indian Code] are the only provisions in the Code which justify proceedings analogous to a non-suit [see I. L. R. 9 Alla. 697].

Where a suit is withdrawn with permission, the effect is to leave the parties in the same position as that in which they would have been if the suit had never been brought. A plaintiff, therefore, who has obtained an order to withdraw will not be debarred by section 54 from claiming in a subsequent suit a relief which he might have included, but did not in the suit which he has been permitted to withdraw [*Behari Lal v. Baran*, I. L. R. 17 Alla. 53].

407 In any fresh action instituted on permission granted under the last preceding section, the plaintiff shall be bound by the law of prescription or limitation in the same manner as if the first action had not been brought.

Permission to bring fresh action not to affect prescription.

Same as section 374 of the Indian Code.

On a plea of non-joinder an action under section 247 was withdrawn, and a fresh action brought. The second action was instituted after the expiration of fourteen days from the date of the order in the claim inquiry. *Held*, that this section applied, and the second action was prescribed [*Fernando v. Jamel*, 2 S. C. R. 88].

408 If an action be adjusted wholly or in part by any lawful agreement or compromise, or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the action, such agreement, compromise, or satisfaction shall be notified to the court by motion made in presence of, or on notice to, all the parties concerned, and the court shall pass a decree in accordance therewith, so far as it relates to the action,

Adjustment of actions out of court.

and such decree shall be final, so far as relates to so much of the subject-matter of the action as is dealt with by the agreement, compromise, or satisfaction.

Substantially the same as section 375 of the Indian Code.

Pleadings, unless specially empowered so to do, cannot compromise cases conducted by them [*Mussamat v. Mussamat*, 2 Alla. 149]; nor can a guardian compromise on behalf of a minor, unless the compromise be bound to be for the minor's benefit [*Roshun v. Syed*, W. R. 1864, p. 83].

An agreement to take an oath by the parties to a suit is not an adjustment under this section [*Vasudera v. Naraina*, I. L. R. 2 Mad. 356].

Chapter 27.

Payment of
money into
court.

Of Payment of Money into Court.

409 The defendant in any action brought to recover a debt or damage may, at any stage of the action, deposit in court such sum of money as he considers a satisfaction in full of the plaintiff's claim.

Same as section 376 of the Indian Code.

As to what amounts to payment into court see *Gujudhur v. Naik* [I. L. R. 8 Cal. 528].

Notice
thereof.

410 Notice in writing of the deposit shall be given by the defendant to the plaintiff, and the amount of the deposit shall (unless the court otherwise directs) be paid out of court to the plaintiff on his application.

Same as section 377 of the Indian Code.

Interest on
deposit not
allowed to
plaintiff after
notice.

411 No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited be in full of the claim or fall short thereof.

Same as section 378 of the Indian Code.

Plaintiff may
accept in part
or

412 If the plaintiff accepts such amount only as satisfaction in part of his claim, he may prosecute his action for the balance; and if the court eventually decides that the deposit by the defendant was a full satisfaction of the plaintiff's claim, the plaintiff must pay the costs of the action incurred after the deposit

and the costs incurred previous thereto, so far as they were caused by excess in the plaintiff's claim.

Same as paragraph 1 of section 379 of the Indian Code.

413 If the plaintiff accepts such amount as satisfaction in full of his claim, he shall present to the court a statement to that effect, embodied in a motion for judgment, and the court shall pass judgment accordingly, and in directing by whom the costs of each party are to be paid the court shall consider which of the parties is most to blame for the litigation.

Illustrations.

- (a) A owes B one hundred rupees. B sues A for the amount, having made no demand for payment, and having no reason to believe that the delay caused by making a demand would place him at a disadvantage. On the plaint being filed, A pays the money into court. B accepts it in full satisfaction of his claim, but the court should not allow him any costs, the litigation being presumably groundless on his part.
- (b) B sues A under the circumstances mentioned in illustration (a). On the plaint being filed, A disputes the claim. Afterwards A pays the money into court. B accepts it in full satisfaction of his claim. The court should also give B his costs of action, A's conduct having shown that the litigation was necessary.
- (c) A owes B one hundred rupees, and is willing to pay him that sum without action. B claims one hundred and fifty rupees, and sues A for that amount. On the plaint being filed, A pays one hundred rupees into court, and disputes only his liability to pay the remaining fifty rupees. B accepts the one hundred rupees in full satisfaction of his claim. The court should order him to pay A's costs.

Substantially the same as paragraph 2 of section 379 of the Indian Code.

414 When a defendant by his answer or any party to an action by petition professes to pay money into court, or when a defendant by his answer sets up a

Money must be actually paid.

tender of any sum of money before action brought, the answer or the petition shall not be received or filed by the court unless either the sum of money so professed to have been paid into court, or so alleged to have been tendered, is actually paid into court, or the requisite steps for the purpose are taken by the defendant or other party, as the case may be.

This chapter
to apply to
any party.

415 The enactments of this chapter shall apply, *mutatis mutandis*, to the case of payment of money into court made by any party to the action in satisfaction of the claim of any other party.

Chapter 28.

Security for
costs in case
of non-
residence.

Of Security for Costs.

416 If at the institution, or at any subsequent stage, of an action, it appears to the court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are, residing out of the jurisdiction of the court, the court may in its discretion, and either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time to be fixed by the order, to give security for the payment of all costs incurred and likely to be incurred by any defendant.

This section is an adaptation of paragraph 1 of section 380 of the Indian Code. Under the Indian procedure it is only when a plaintiff is resident out of British India that security is required.

"Residing out of British India" in the Indian Code has been held to mean so residing in such circumstances as will afford reasonable probability that the plaintiff or plaintiffs will not^c be forthcoming when the suit is decided [*Mahomed Shuffli v. Laldin Abdula*, I. L. R. 3 Bom. 227].

Where
defendant is
non-resident.

417 If at the institution, or at any subsequent stage of an action, it appears to the court that the defendant, or (where there are more defendants than

* The word "not" has, by a clerical error, been omitted in the Report.

one) that any defendant, is residing out of the jurisdiction of the court, the court may in its discretion, and either of its own motion or on the application of such defendant, order the plaintiff or plaintiffs, within a time to be fixed by the order, to give security for the payment of all costs incurred and likely to be incurred by such defendant.

418 In the event of such security not being furnished within the time so fixed, the court shall dismiss the action, unless the plaintiff or plaintiffs be permitted to withdraw therefrom under the provisions of section 406, or show good cause why such time should be extended, in which case the court may extend it.

If not furnished when ordered, action may be dismissed.

When an action is dismissed under this section the plaintiff may within thirty days, and after due notice in writing to the defendant, apply for an order to set the dismissal aside, and if it is proved to the satisfaction of the court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the court shall set aside the dismissal upon such terms as to security, costs, or otherwise as it thinks fit, and shall appoint a day for proceeding with the action.

Dismissal may be set aside.

Substantially the same as section 381 of the Indian Code.

A person whose action has been dismissed under this section may, if defendant in a subsequent action, rely on the same matter put forward in the previous suit. *Quære* : Could he do so if he were plaintiff in the subsequent suit? [*Rungrar v. Sidhi Mohamed*, I. L. R. 6 Bom. 482].

The dismissal here referred to is dismissal of the suit as against the defendant or defendants for the payment of whose costs the security was ordered to be given [see *Ward v. Ward*, 11 Beav. 159]. The court should first see that the notice of the order requiring security has been served on the plaintiff or his pleader [I. L. R. 5 Mad. 265].

419 Whoever leaves, or is about to leave, the jurisdiction under such circumstances as to afford reasonable probability that he will not be forthcoming whenever

What amounts to non-residence.

he may be called upon to pay costs, shall be deemed to be residing out of the jurisdiction within the meaning of section 416 or 417.

See section 382 of the Indian Code. Under this section of the Indian Code it has been held that when a plaintiff leaves British India before the case is decided, the defendant should apply to the court to take security for costs [*In re Calcutta and South Eastern Railway Co.*, 8 W. R. 217], and then, unless there is a reasonable probability that he will be forthcoming whenever he may be called on to pay costs, or that he has sufficient immovable property in British India to meet them, he must give security.

Chapter 29.

Of Commissions.

A.—Commissions to examine Witnesses.

Commission
to examine
sick person
within
jurisdiction;

420 Any court may in any action issue a commission for the examination on interrogatories or otherwise, and on oath or affirmation, of persons resident within the local limits of its jurisdiction who are from sickness or infirmity unable to attend the court, or of women who, according to the customs and manners of the country, ought not to be compelled to appear in public.

See section 383 of the Indian Code.

A commission will be granted almost as a matter of course to examine a material witness if in any way ill or infirm [*Huree Dass v. Meer Moazzum*, 15 W. R. 477].

to whom to
be issued.

421 The commission for the examination of a person who resides within the local limits of the jurisdiction of the court issuing the same may be issued to any person whom the court thinks fit to execute the same.

Same as section 385 of the Indian Code.

Commission
to examine
in other
cases :

422 Any court may in any action issue a commission for the examination of—

- (a) Any person resident beyond the local limits of its jurisdiction;
- (b) Persons who are about to leave such limits before the date on which they are required to be examined in court; and

- (c) Civil and military officers of Government who cannot in the opinion of the judge attend the court without detriment to the public service; and
- (d) Women who, according to the customs and manners of the country, ought not to be compelled to appear in public.

Such commission shall ordinarily be issued to any court, except the Supreme Court, within the local limits of whose jurisdiction such person resides, and which can most conveniently execute the same. Provided that, under special circumstances, the commission may be directed to any person whom the court issuing the commission thinks fit to appoint.

to whom to
be issued.

Proviso.

See section 386 of the Indian Code.

The application under this section should be supported by some reason other than the mere distance of the residence of the witness. If the witness is a stranger, commission will be right and reasonable, but not if he is the servant of the applicant [*Amrith Nath v. Dhunput Singh*, 20 W. R. 253].

A commission will not be granted to examine a party at his own request, unless he can show very strong reasons [*Doucett v. Wise*, 1 Ind. Jur. N. S. 357]. Notice should be given to the opposite party [*Taruknath v. Gouree Churn*, 3 W. R. 147].

423 When any court to which application is made for the issue of a commission for the examination of a person residing at any place not within the colony is satisfied that his evidence is necessary, the court may issue such commission.

Evidence of
non-resident
person must
be necessary.

See section 387 of the Indian Code.

As a general rule a plaintiff will not be allowed the indulgence of being examined abroad, but under peculiar circumstances where his duties prevent him from returning to Ceylon except at a large sacrifice of time and money, and where he is not wilfully avoiding the Ceylon courts, he may give his evidence abroad on commission [*Moorhouse v. Cafoor*, 1 Tamb. 10].

424 Every court receiving a commission for the examination of any person shall examine him pursuant thereto.

Court to
execute the
commission.

Same as section 388 of the Indian Code.

Return
thereof.

425 After the commission has been duly executed, it shall be returned, together with the evidence taken under it, to the court out of which it issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order; and the commission and the return thereto, and the evidence taken under it, shall (subject to the provisions of the next following section) be recorded in the action.

Same as section 389 of the Indian Code.

It is the duty of the party obtaining a commission for the examination of witnesses to take all such steps as are necessary to secure their attendance before the Commissioner [*Leckraj v. Paleeram*, 2 Alla. 210].

Evidence
taken under
commission
when
admissible.

426 Evidence taken under a commission shall not be read as evidence in the action without the consent of the party against whom the same is offered, unless—

- (a) The person who gave the evidence is beyond the jurisdiction of the court, or dead, or unable from sickness or infirmity to attend to be personally examined; or is a person whom the court, in accordance with the customs and manners of the country, sees reason to exempt from personal appearance in court; or
- (b) The court in its discretion, for good cause to be assigned by it, dispenses with the proof of any of the circumstances mentioned in the last preceding section and authorises the evidence of any person being read as evidence in the action, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

Substantially the same as section 390 of the Indian Code.

427 The provisions hereinbefore contained as to the execution and return of commissions shall apply to commissions issued by—

Foreign courts to which provisions apply.

- (a) Courts situate within the limits of British India, and established by the authority of Her Majesty or of the Governor-General in Council; or
- (b) Courts situate in any part of the British Empire other than British India; or
- (c) Courts of any foreign country for the time being in alliance with Her Majesty.

Same as section 391 of the Indian Code.

B.—Commissions for Local Investigations.

428 In any action or proceeding in which the court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits, and the same cannot be conveniently conducted by the judge in person, the court may issue a commission to such person as it thinks fit, directing him to make such investigation and to report to the court.

Commission to make local investigation.

Same as paragraph 1 of section 392 of the Indian Code.

A judge is allowed the widest discretion in granting or refusing a local investigation [*Nirod Krishna v. Woomanath*, I. L. R. 4 Cal. 718].

Notice should be given to the parties of the time when the local investigation will be held [*Kristo Monee v. Eglinton*, 12 W. R. 139].

429 The commissioner, after such local inspection as he deems necessary, and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing, subscribed with his name, to the court.

Return thereof.

Same as paragraph 1 of section 393 of the Indian Code.

As to fixing a day to hear objections and giving notice to the parties, see 21 *Suth. Civ. R.* 2.

C.—*Commissions to examine Accounts.*

Commission
to examine
accounts ;

430 In any action in which an examination or adjustment of accounts is necessary, the court may issue a commission to such person as it thinks fit, directing him to make such examination.

Same as section 394 of the Indian Code.

As to the procedure under the Indian Code in taking accounts see *Degamber v. Kallynath* [I. L. R. 7 Cal. 654] ; *Amoda v. Dwarkanath* [I. L. R. 6 Cal. 754].

This section should be resorted to when the taking of accounts by the judge would occasion waste of public time [I. L. R. 6 Cal. 758]. It is not necessary that the consent of parties should be obtained [L. R. 1 I. A. 362], or that the Commissioner should be sworn or affirmed [3 N. W. P. 232].

Court to
furnish
instructions.

431 The court shall furnish the commissioner with such part of the proceedings of the action and such detailed instructions as appear necessary, and the instructions shall distinctly specify whether the commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination.

Same as paragraphs 1 and 2 of section 395 of the Indian Code.

General Provisions.

Evidence
taken on
commission
shall be filed
and recorded
in the action.

432 The commission in every case within this chapter shall be entitled as in the action, whether of regular or summary procedure, in which it issued, and on its return shall, with all the proceedings, evidence, and documents, if any, taken therein, be filed and recorded as of that action.

The report of the commissioner or commissioners in each case within (B) and (C), and the evidence taken by a commissioner (but not the evidence without the report), shall be evidence in the action ; but the court, or, with the permission of the court, any of the parties to the action, may examine the commissioner personally in open court touching any of the matters referred to him, or mentioned in his report, or as to the manner

Commissioner
may be
examined
personally.

in which he has made the investigation or conducted his proceedings.

Substantially the same as paragraph 2 of section 393 of the Indian Code.

The report and deposition are to be taken as evidence in the case—not conclusive evidence—and form part of the record [*Azim v. Alimooddeen*, 17 W. R. 270] ; and must be taken into consideration by the Appellate Court [*Rajnath v. Doorga*, 12 W. R. 136] ; and unless any objection is raised to the report in the first court or in the grounds of appeal, it should not be listened to [*Seth Gujmul v. Chohee*, 2 Ind. App. 34. But see *Tweedie v. Poorno Chunder*, 2 W. R. 138]. A court may reject part and accept part [*Poreah v. Martin*, 1 W. R. 93].

On the return of the Commissioner's report a day should be fixed to hear objections, and notice given to the parties [*Ram Narain v. Goburdhun*, 21 W. R. 2].

433 Before issuing any commission under this chapter, the court may order such sum (if any) as it thinks reasonable for the expenses of the commission, to be paid into court by the party at whose instance or for whose benefit the commission is issued.

Court may order payment into court of expenses.

Same as section 397 of the Indian Code.

434 Any commissioner appointed under this chapter shall have authority to administer an oath or affirmation, and may, unless otherwise directed by the order of appointment—

Powers of commissioners.

- (a) Examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the commissioner thinks proper to call upon to give evidence in the matter referred to him ;
- (b) Call for and examine documents and other things relevant to the subject of inquiry ;
- (c) At any reasonable time enter upon or into any land or building mentioned in the order.

Same as section 398 of the Indian Code.

A Commissioner has the widest power and discretion to inquire into the matters referred to him for investigation [*Mohun Lall v. Unopoorna*, 9 W. R. 566] ; but he cannot go beyond his order [*Ram Dhun v. Ram Monee*, 21 W. R. 280].

Provisions of
Code as to
witnesses to
apply.

435 The provisions of this Ordinance relating to the summoning, attendance, and examination of witnesses, and to the remuneration of, and penalties to be imposed upon, witnesses, shall apply to persons required to give evidence or to produce documents under this chapter, whether the commission in execution of which they are so required has been issued by a court situate within, or by a court situate beyond, the limits of the colony.

See section 399 of the Indian Code.

Parties
should appear
before
commissioner.

436 Whenever a commission is issued under this chapter, the court shall direct that the parties to the action shall appear before the commissioner in person or by their recognised agents or proctors.

If the parties do not so appear, the commissioner may proceed *ex parte*.

Same as section 400 of the Indian Code.

A party refusing to appear before a Commissioner is not at liberty afterwards to take any objection to his report [*Bamun Doss v. Brojo Kishore*, 6 W. R. 130].

Affidavits.

Evidence on
affidavit.

437 Whenever any order has been made by any court for the taking of evidence on affidavit, or whenever evidence on affidavit is required for production in any application or action of summary procedure, whether already instituted or about to be instituted, an affidavit or written statement of facts conforming to the provisions of section 181 may be sworn or affirmed to by the person professing to make the statement embodied in the affidavit before any court or justice of the peace or commissioner to administer oaths within the local limits of whose jurisdiction he is at the time residing, and the fact that the affidavit appears to be entitled in an action in a competent court shall be sufficient authority to such court or justice of the peace to administer the oath or affirmation.

438 Every affidavit shall be entitled as in the court and action in which it is to be used, and shall be signed by the declarant in the presence of the court, justice of the peace, or commissioner before whom it is sworn or affirmed.

Affidavit to be duly entitled and to be signed by the declarant.

An affidavit proving a debt in insolvency proceedings need not be in accordance with this section, but may follow the form given in the schedule to the Ordinance, as the Civil Procedure Code does not affect proceedings under the Insolvency Ordinance [*In re the Insolvency of Thornhill*, 1 N. L. R. 243.]

439 In the event of the declarant being a blind or illiterate person, or not able to understand writing in the English language, the affidavit shall at the same time be read over or interpreted to him in his own language, and the jurat shall express that it was read over or interpreted to him in the presence of the court, justice of the peace, or commissioner, and that he appeared to understand the contents; and also that he made his mark or wrote his signature in the presence of the court, justice of the peace, or commissioner. And when a mark is made instead of a signature, the person who writes the marksman's name against the mark shall also sign his name and address in the presence of the court, justice of the peace, or commissioner.

Case of illiterate person.

440 Every affidavit must be fairly written, and must exhibit no erasures or blotting or blanks; if any alteration is needed to be made in the original writing before it is sworn or affirmed to, every excision of a word, or letter, or figure shall be made by so drawing a line through it as to leave the word, letter, or figure still legible; and every added word, letter, or figure shall be added by interlineation, not by superposition or alteration; and every excision and interlineation shall be initialled by the judge, justice of the peace, or commissioner before whom the affidavit is affirmed or sworn.

Alteration of affidavit.

PART 4.

ACTIONS IN PARTICULAR CASES.

Chapter 30.

Actions by Paupers.

Paupers.

441 Subject to the following rules, any action may be brought by a pauper.

Explanation.—A person is a “pauper” when he is not entitled to property worth fifty rupees, other than his necessary wearing apparel and the subject-matter of the action.

Section 401 of the Indian Code.

A plaintiff may be allowed to carry on as a pauper a suit instituted in the ordinary way [*Nirmul v. Doyal*, I. L. R. 2 Cal. 130].

A suit can be brought *in formâ pauperis* on behalf of a pauper minor by a next friend who is not a pauper [*Golaupmonee v. Prosonomoye*, 11 B. L. R. 373; *Venkatanarasayya v. Achemma*, I. L. R. 3 Mad. 3], but the failure of the suit is no ground for throwing the costs of the suit on the next friend [*Brijessuree v. Kishore*, 25 W. R. 316].

An executor or administrator can sue *in formâ pauperis* [*In re Bill*, I. L. R. 7 Mad. 390].

When a pauper may not sue.

442 No action shall be brought by a pauper to recover compensation for libel, slander, or abusive language.

Section 402 of the Indian Code.

Form of petition for leave to sue.

443 The application for permission to sue by a pauper shall be in writing, and shall contain the particulars required by section 40 in regard to plaints in actions; a schedule of any movable or immovable property belonging to the applicant, with the estimated value thereof, shall be annexed thereto, and it shall be subscribed in the manner hereinbefore prescribed for the subscription of plaints.

Section 403 of the Indian Code.

Application to be verified, and particulars of verifications.

444 Attached to every such application shall be an affidavit sworn or affirmed by the applicant and by two headmen or respectable persons of the place at which the applicant resides, to the following effect :

(a) That the applicant is a pauper ;

(b) That he has not within the two months next before the presentation of his application disposed of any property fraudulently, or with a view to obtain the benefit of this chapter ;

(c) That he has not entered into any agreement with reference to the subject-matter of the proposed action under which any person has obtained an interest in that subject-matter.

See section 407 of the Indian Code.

445 Notwithstanding anything contained in section 24, the application shall be presented to the court by the applicant in person. Application must be made in person,

See section 404 of the Indian Code.

This section is imperative, and a petition to sue *in formâ pauperis* must be presented in person [*Burgess v. Sidden*, I. L. R. 10 Mad. 193].

446 If the application be not framed or presented in the manner prescribed by sections 443 and 445, the court shall reject it. or court will reject it.

Section 405 of the Indian Code.

447 If the application be in proper form, it shall forthwith be referred to one of the proctors of the court, who shall be selected in rotation for this purpose, and shall inquire of the applicant what are the grounds of his proceeding and the evidence by which he proposes to support it, and after examining any documents or other evidence which the applicant may produce to him, the proctor referee shall certify to the court his opinion whether or not the applicant has a good cause of action against the defendant. Court to direct a proctor to make inquiry of applicant, and to certify his opinion to the court, which will accordingly reject the application, or make order for hearing the question of pauperism.

If such proctor shall certify that the applicant has not a good cause of action, the court shall reject the application ; but if he shall certify that the applicant has a good cause of action, the court shall, on the footing

of the application and of the proctor's certificate, make an interlocutory order under alternative (b) of section 377, appointing a day for the determination of the question of pauperism, and intimating that the opposite party or respondent will be heard in opposition to the application on this ground upon the day appointed. And the proceedings thereupon shall be in accordance with the provisions of chapter XXIV.

Sections 406 and 408 of the Indian Code.

On pauperism
being found,
leave to sue
to be granted.

448 If on the day so appointed, or on a subsequent day to which the hearing may have been adjourned, the question of pauperism be determined in favour of the applicant, then the application to be allowed to sue as a pauper shall be granted, and an order to that effect shall be made by the court.

See section 409 of the Indian Code.

When an application for leave to sue as a pauper is refused, and the applicant subsequently brings a suit for the same matter on a Full Court fee, such suit dates for the purposes of limitation from the time of filing the plaint, and not from the date of the application for leave to sue as a pauper. *Aliter* when, leave to sue as a pauper having been granted, the applicant is dispauperised [*Naraini v. Makhan Lal*, I. L. R. 17 Alla. 526; see also *Keshav v. Krishnarao*, I. L. R. 20 Bom. 508].

Proceedings
thereon.

449 And upon the application being granted it shall be numbered and filed, and shall be deemed the plaint in the action, and the action shall proceed in all other respects as an action instituted under chapter VII., except that the plaintiff shall not be liable to any stamps in respect of any petition, appointment of the proctor, or other proceeding connected with the action.

See section 410 of the Indian Code.

There is no suit in existence until the application has been granted [*Dwarkanath v. Madharrar*, I. L. R. 10 Bom. 207].

Recovery of
value of
stamps.

450 If the plaintiff succeeds in the action, the court shall calculate the amount of stamps which would have been paid by the plaintiff if he had not been

permitted to sue as a pauper ; and such amount shall be a first charge on the subject-matter of the action.

See section 411 of the Indian Code.

A defendant should not be made liable to pay court fees on any sum greater than that decreed against him [*Chandraseka v. The Secretary of State*, I. L. R. 14 Mad. 163].

451 If the plaintiff fails in the action, or if he is dispaupered, or if the action is dismissed under section 84, or struck off the file under section 88, the court shall order the plaintiff, or any person added under section 18 as plaintiff in the action, to pay the stamp fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper.

When court may order plaintiff to pay stamp fees.

See section 412 of the Indian Code.

This section does not apply to the costs of a successful defendant in a pauper suit [see *Jetha v. Gulraj*, I. L. R. 8 Bom. 577].

452 An order of refusal to allow the applicant to sue as a pauper made under section 447 shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue ; but the applicant shall be at liberty to institute an action in the ordinary manner in respect of such right, on first paying the costs of his unsuccessful application.

Refusal of application no bar to pauper's right to sue.

Same as section 413 of the Indian Code.

453 A defendant in any action may apply to the court in which such action is pending for leave to defend the action as a pauper. The application shall be made in the same manner as, and shall contain the particulars by this chapter required to be contained in, applications to sue as a pauper, except that the particulars necessary to be inserted in answers in actions shall be substituted for those necessary in complaints, and shall, *mutatis mutandis*, and so far as the same is practicable, be subject to the same rules and conditions as are in this chapter prescribed with regard to applications for leave to sue as a pauper.

Application to defend as a pauper.

When court
may order
plaintiff to be
dispaupered.

454 The court may on motion made by the other party, of which one week's notice in writing has been given to the party permitted to sue or defend as a pauper, order such party to be dispaupered—

- (a) If he is guilty of vexatious or improper conduct in the course of the action ;
- (b) If it appears that his means are such that he ought not to continue to sue or defend as a pauper ; or
- (c) If he has entered into an agreement with reference to the subject-matter of the action under which any other person has obtained an interest in such subject-matter.

Same as section 414 of the Indian Code.

If it appears from facts that have been discovered after permission to sue *in formâ pauperis* has been granted, that the applicant ought not to be allowed to continue to sue as a pauper, the remedy is by application under this section [see *In the Matter of Khodjoonissa*, 7 W. R. 486].

Costs of
application to
be costs in
cause.

455 The costs of an application for permission to sue or defend as a pauper, and of an inquiry into pauperism, are costs in the action.

See section 415 of the Indian Code.

Chapter 31.

Actions by or
against the
Crown.

Actions by or against the Crown or Public Officers.

456 All actions by or against the Crown shall be instituted by or against (as the case may be) the Attorney-General. Provided that in courts of requests, any person duly appointed under sub-section (d) of section 25 may institute an action for and in the name of the Crown as party plaintiff.

In actions by the Crown instituted by the Attorney-General, instead of inserting in the plaint the name and description and place of abode of the plaintiff, it shall be sufficient to insert the words "the Attorney-General."

Attorney-General does not in this section include the Solicitor-General or any Crown Counsel.

See section 416 of the Indian Code.

An action against the Attorney-General of Ceylon, as representing the Government of Ceylon, for alleged wrongful act on its part, should be treated as an action brought against the Attorney-General as representing the Crown, in accordance with this section [*Le Mesurier v. the Attorney-General*, 3 N. L. R. 227].

457 In an action to which the Crown is a party, processes of court other than the original summons issuing against the Crown shall be served upon the Attorney-General, or the Crown counsel having jurisdiction in the district where the court is situate; but the original summons shall be served upon the Attorney-General. Service of process.

458 The court, in fixing the day for the Attorney-General to answer to the plaint, shall allow a reasonable time for the necessary communication with the Government through the proper channels, and may extend the time at its discretion. Attorney-General to have reasonable time to appear.

See section 420 of the Indian Code.

459 Where the defendant is a public officer, the court may send a copy of the summons to the head of the office in which the defendant is employed, for the purpose of being served on him, if it appear to the court that the summons may be most conveniently so served. Service on public officer.

Same as section 422 of the Indian Code.

460 If the public officer on receiving the summons considers it proper to make a reference to the Government before answering to the plaint, he may apply to the court to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channel; and the court upon such Public officer may apply for time to answer.

application may extend the time for so long as appears to be requisite.

Same as section 423 of the Indian Code.

Attorney-General and public officer entitled to notice.

461 No action shall be instituted against the Attorney-General as representing the Crown, or against a public officer in respect of an act purporting to be done by him in his official capacity, until the expiration of one month next after notice in writing has been delivered to such Attorney-General or officer (as the case may be), or left at his office, stating the cause of action and the name and place of abode of the person intending to institute the action and the relief which he claims; and the plaint in such action must contain a statement that such notice has been so delivered or left.

See section 424 of the Indian Code.

A notice under this section is not vitiated by the statement of a claim for relief greater than that ultimately claimed in the action [*Le Mesurier v. Murray*, 3 N. L. R. 113].

This section supersedes the provisions of section 122 of Ordinance No. 17 of 1869 as to notice of action against a Customs Officer [*ibid*].

The form of the notice must not be that of a mere letter. An attorney's letter declaring that he has been instructed to take legal proceedings is informal [*Norris v. Smith*, L. R. 2 P. & D. 353].

No cause of action other than that stated in the notice can be raised at the trial [*Ullman v. The Justices of the Peace for Calcutta*, 8 B. L. R. 265].

The notice should set forth clearly the grounds of the complaint [*Smith & Co. v. West Derby Local Board*, 3 C. P. D. 423]; and the time and place where the act complained of was done [*Breese v. Jerdeen*, 12 L. J. Q. B. 234]. The notice must give the name and place of abode of the party intending to sue [*Dwarkanath v. Corporation of Calcutta*, I. L. R. 18 Cal. 91, p. 92].

This section does not apply where the suit is one *ex contractu* [*Rajmool v. Hanmant*, I. L. R. 20 Bom. 697].

Writ against person or property in such action.

462 No writ against person or property shall be issued against the Attorney-General in any action brought against the Crown in any case.

See section 425 of the Indian Code.

463 If the Government undertake the defence of an action against a public officer, the Attorney-General shall apply to the court, and upon such application the court shall substitute the name of the Attorney-General as a party defendant in the action.

See section 426 of the Indian Code.

464 If such application is not made by the Attorney-General on or before the day fixed in the notice for the defendant to appear and answer to the plaint, the case shall proceed as in an action between private parties, except that the defendant shall not be liable to arrest, nor his property to attachment, otherwise than in execution of a decree.

See section 427 of the Indian Code.

465 In an action against a public officer in respect of such act as aforesaid, the court shall exempt the defendant from appearing in person when he satisfies the court that he cannot absent himself from his duty without detriment to the public service.

Same as section 428 of the Indian Code.

Actions by Aliens, and by or against Foreign Rulers. Chapter 32.

466 Alien enemies residing in Ceylon with the permission of the Governor, and alien friends, may sue in the courts of this island as if they were subjects of Her Majesty.

No alien enemy residing in Ceylon without such permission, or residing in a foreign country, shall sue in any of such courts.

Explanation.—Every person residing in a foreign country, the Government of which is at war with the United Kingdom of Great Britain and Ireland, and carrying on business in that country without a license in that behalf under the hand of one of Her Majesty's Secretaries of State, or of the Colonial Secretary of this island, shall, for the purpose of the second paragraph of this section, be deemed to be

- an alien enemy residing in a foreign country.

Substantially the same as section 430 of the Indian Code.

As to the right of an alien to enter British territory see *Musgrove v. Cheen* [App. Cas. (1891) 272].

As to prisoners of war see *Sparenburgh v. Bannatyne* [1 Bos. & P. 163]; *Maria v. Hall* [2 *ibid* 236].

By foreign
states.

467 A foreign state may sue in the courts of this colony provided that—

- (a) It has been recognised by Her Majesty ; and
- (b) The object of the action is to enforce the private rights of the head, or of the subjects, of the foreign state.

The court shall take judicial notice of the fact that a foreign state has not been recognised by Her Majesty.

Same as section 431 of the Indian Code.

If the Foreign State has been recognised, the recognition is conclusive of the right to sue. A Foreign State is limited to subjects stated in the text, and cannot sue for anything else. Infringing its prerogative right does not constitute a cause of action [*Emperor of Austria v. Day*, 2 Giff. 628].

Private rights.—Meaning those private rights of a State that must be enforced through a court of justice as distinguished from its political rights [*Hajon Manik v. Bur Sing*, I. L. R. 11 Cal. 17].

Foreign States can only obtain relief subject to the rules of the court, and pursuant to its rules of practice, and one of the conditions is that, like an individual, it will give discovery. Where a Foreign State is plaintiff, the defendant should apply to it to name some person from whom discovery may be sought, and if it refuses, the court will be justified in dealing with the suit as if it were the case of an ordinary individual in which discovery had been refused [*United States of America v. Wagner*, 2 Ch. App. 590 ; *Republic of Peru v. Weguelin*, L. R. 20 Eq. 140].

Recognised
agents of
foreign
powers.

468 Personsspecially appointed by order of Government at the request of any sovereign prince or ruling chief, whether in subordinate alliance with the British Government or otherwise, and whether residing within or without the island, or at the request of any person competent in the opinion of the Government to act on behalf of such prince or chief, to prosecute or defend any action on his behalf, shall be deemed to be the

recognised agents by whom appearances and applications may be made or acts may be done under this Ordinance on behalf of such prince or chief.

A person appointed under this section may authorise or appoint persons to make and do appearances, applications, and acts in any such action, as if he were himself a party to the action.

See section 432 of the Indian Code.

A Political Agent if not specially appointed cannot sue on behalf of a Prince [*Ventkarav v. Madhavrav*, I. L. R. 11 Bom. 53].

As to meaning of "ruling chief" see I. L. R. 1 Bom. 418.

469 Any such prince or chief, and any ambassador or envoy of a foreign state may, with the consent of Government, certified by the signature of the Colonial Secretary (but not without such consent), be sued in any competent court.

When foreign state may be sued.

Such consent shall not be given unless—

- (a) The prince, chief, ambassador, or envoy has instituted an action in such court against the person desiring to sue him ; or
- (b) The prince, chief, ambassador, or envoy by himself or another trades within the local limits of the jurisdiction of such court ; or
- (c) The prince, chief, ambassador, or envoy is in possession of immovable property situate within such limits, and is to be sued with reference to such possession or for money charged on that property.

No such prince, chief, ambassador, or envoy shall be arrested under this Ordinance ; and no decree shall be executed against the property of any such prince, chief, ambassador, or envoy, unless with consent of Government certified as aforesaid.

See section 433 of the Indian Code.

Chapter 33. *Actions by and against Corporations and Companies.*

Actions by or
against a
corporation
or company.

470 In actions by or against any corporation, or by or against a board or other public body, or any company authorised to sue or be sued, the name and style of the corporation, board, public body, or company, or of the officer (if any) in whose name any such corporation, board, public body, or company is authorised to sue and be sued, as the case may be, may be inserted as the name of the plaintiff or defendant; and the plaint or answer may be subscribed on behalf of the corporation, board, public body, or company by any member, director, secretary, manager, or other principal officer thereof who is able to depose to the facts of the case; and in any case in which such corporation, board, public body, or company is represented by a proctor, shall be subscribed by such proctor.

See section 435 of the Indian Code.

A Joint Stock Company as a Corporation aggregate cannot appear in an action, and is consequently not entitled to take advantage of the provisions of section 24 as to "recognised agents," but its plaint or answer must, under this section, be subscribed on behalf of the Company by any member, director, secretary, manager, or other principal officer thereof who is able to depose to the facts of the case. Where such Company appears to an action by an attorney, such attorney must be appointed under its seal, or be appointed by an agent empowered under the Company's seal to bring or defend an action [*The Singer Manufacturing Co. v. The Sewing Machines Co., Ltd.*, 2 C. L. R. 200; 2 S. C. R. 27]. In this case a Joint Stock Company was sued as defendant in an action, and an interim injunction obtained which the Company applied to dissolve. The application was made through a proctor appointed by a person professing to be the recognised agent and manager of the Company. The District Court ruled that the recognised agent could not appoint a proctor, whereupon the agent himself signed the petition which was then partly heard. The Company appealing against this ruling, *held*, that the ruling once and for all terminated the question before the court and was therefore appealable; and that the Company's application and the proxy to their proctor not having been taken off the file or revoked, such appeal was properly filed by such proctor [see also *O. B. C. v. Corbet*, 4 S. C. C. 158].

In case of an unincorporated or unregistered Company the names of the individuals must be given, if known : if not, the plaintiff should sue the Company by the name under which it carries on business, stating his inability to describe them better. [*Koylas Chunder v. Ellis*, 8 W. R. 45]. Such a Company cannot sue in its own name by its secretary [*The Mhd. Association v. Baksh Ram*, I. L. R. 6 Alla. 284].

471 When the action is against a corporation, or against a board or other public body, or a company authorised to sue and be sued in the name of an officer or of a trustee, except in cases where a particular mode of service is directed by law, the summons may be served—

Service on
corporation
or company.

(a) By leaving it at the registered office (if any) of the corporation, board, public body, or company ; or

(b) By giving it to the secretary or other principal officer of the corporation, board, public body, or company ;

and the court may in such summons or by special order require the personal appearance of such secretary or other principal officer of the corporation, board, public body, or company who may be able to answer material questions relating to the action.

See section 436 of the Indian Code.

Actions by and against Trustees, Executors, and Administrators.

Chapter 34.

472 In all actions concerning property vested in a trustee, executor, or administrator, when the contention is between the persons beneficially interested in such property and a third person, the trustee, executor, or administrator shall represent persons so interested : and it shall not ordinarily be necessary to make them parties to the action. But the court may, if it think fit, order them, or any of them, to be made such parties.

Actions
against
trustees,
executors,
and adminis-
trators.

This section is the same as section 437 of the Indian Code.

If beneficiaries are added a few of them may be made to represent the whole body [*Gaslight & Coke Co. v. Tourse*, 35 C. D. 519, p. 526].

The parties beneficially interested should always be made parties in the cause when the executors or trustees are wholly uninterested in the matter [*Clegg v. Rowland*, L. R. 3 Eq. 373]; or they have from any cause an interest adverse to that of the beneficial owner [*Beresford v. Ramasabba*, I. L. R. 13 Mad. 197]; or refuse to sue [*Muldrum v. Scozen*, 56 L. T. Rep. 472], and where one trustee sued another to realise a mortgage security the beneficial owners were made parties [*Butler v. Butler*, 7 C. D. 120]. The beneficial owner can sue to get the benefit of a decree obtained by his trustee [*Juggobundho v. Nil Comul*, W. R. 1864, p. 190].

All executors
should be
made parties.

473 When there are several trustees, executors, or administrators, they shall all be made parties to an action by or against one or more of them.

Proviso.

Provided that executors, who have not proved their testator's will, and trustees, executors, and administrators beyond the local limits of the jurisdiction of the court, need not be made parties.

See section 438 of the Indian Code.

Executors
and adminis-
trators liable
in costs.

474 In every action brought by an executor or administrator in right of his testator or intestate, such executor or administrator shall, unless the court shall otherwise order, be liable to pay costs to the defendant in case of judgment being entered for the defendant, and in all other cases, in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered accordingly.

Both under this section and according to the English Law which governed cases of the kind before the passing of the Code the costs which an executor or an administrator who fails in an action brought by him for the benefit of his testator's or intestate's estate is condemned to pay can be recovered from him personally and not from the estate [*Edirishamy v. De Silva*, 2 N. L. R. 242].

If an official administrator appeal against a judgment without leave of court he will be personally liable in costs [*Naidehamy v. Silva*, 2 N. L. R. 289].

475 Unless the court directs otherwise, the husband of a married executrix or administratrix shall not be a party to an action by or against her in her representative capacity. Husband of executrix not to be made party.

Same as section 439 of the Indian Code.

Actions by and against Minors and Persons under other Disqualification. Chapter 35.

476 Every action by a minor shall be instituted in his name by an adult person, who in such action shall be designated in the plaint the next friend of the minor, and may be ordered personally to pay any costs in the action as if he were the plaintiff. Action by minor.

Same as paragraph 1 of section 440 of the Indian Code.

A minor is as much bound by a judgment in his own action as if he were of full age [*Moddroo Soodun v. Prithee Bullub*, 16 W. R. 231] and he is liable to arrest [*Sherafutoollah v. Adbedoonissa*, 17 W. R. 374]. He cannot be heard on the ground of non-representation by the court executing the decree, but must apply for review or file a regular suit to procure an injunction restraining execution [*Nawab v. Har Churn*, 6 Alla. 98]. As to the course which a minor on attaining his majority should adopt to get rid of a judgment prejudicial to his interests see *Dabee Dutt v. Subodra Bibee* [25 W. R. 449]; *Rojhubar v. Bhikya* [I. L. R. 12 Cal. 69].

A next friend's duty ends with final judgment [*Geereebulla v. Chunder*, I. L. R. 11 Cal. 213].

When a next friend retains an attorney to act for the infant no contract is created between the attorney and the infant upon which the attorney can sue the infant for costs [*Radhanath Bose v. Lalloprosunno Ghose*, 2 Ind. Jur. N. S. 269; *Devkabai v. Jefferson*, I. L. R. 10 Bom. 248].

The next friend may be ordered to pay costs, and if so he cannot levy them from the minor's estate [*The Collector of Mymensing v. Kali Chunder*, S. D. 1st September, 1860. See, however, *Devkabai v. Jefferson*, I. L. R. 10 Bom. 248]. A next friend is not liable unless he has instituted a useless suit without due consideration [*Kenrick v. Wood*, L. R. 9 Eq. 333], or it is proved that the plaintiff is not a minor [*Palmer v. Walesby*, L. R. 3 Ch.

App. 732]: and whenever it is possible the court will allow his costs out of the minor's estate for any proceeding instituted for the minor's benefit, although unsuccessful, provided he appears to have acted *bona fide* [*Cross v. Cross*, 8 Beav. 455], but not otherwise [*Geerechaila v. Chunder*, I. L. R. 11 Cal. 213]; and where a guardian is personally held liable for costs, it should be stated in the decree or order of court, since ordinarily he is only liable in his representative capacity [*Komul v. Surbessur*, 21 W. R. 298].

The appearance of the minor may be taken into consideration in deciding the question of minority [*Khetter v. Ramessur*, W. R. 1864, p. 304].

Where a suit is brought in violation of this section, the plaint should be returned [*Russik Das v. Preonath*, I. L. R. 10 Cal. 102].

Next friend
and guardian
ad litem.

477 Every application to the court on behalf of a minor (other than an application under section 487) shall be made in his name by his next friend or his guardian for the action, and shall be so expressed to be made on the face of the application.

See section 441 of the Indian Code.

The order of a District Judge allowing a party to sue as "next friend" must disclose his jurisdiction to make such order [*Deen v. Pulle*, 2 S. C. R. 81].

Where the mother of a minor without being appointed his "next friend" filed a plaint on behalf of the minor, and was afterwards appointed "next friend," the date of the appointment, it was held, should be taken as the date of the institution of the case [*Deen v. Pulle*, 2 S. C. R. 81].

Procedure
where no
next friend.

478 If a plaint be filed by or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the proctor or other person by whom it was presented. Such application shall be made on summary procedure by the defendant; and the court, after hearing the objections, if any, of the person against whom it is made, may make such order in the matter as it thinks fit.

Substantially the same as section 442 of the Indian Code.

This section refers to a case where on the face of the plaint it appears that it was filed by a person who was a minor. It does not contemplate any inquiry into the question of minority [*Beni Ram v. Ram Lall*, I. L. R. 13 Cal. 189].

479 Where the defendant to an action is a minor, the court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the action for such minor, and generally to act on his behalf in the conduct of the case.

Court may
appoint
guardian
ad litem.

Same as paragraph 1 of section 443 of the Indian Code.

If a minor is sued, and he takes no steps to have a guardian *ad litem* appointed to represent him in the action, then it is for the plaintiff to procure the appointment of a guardian in order that he may be able to continue the action [*Paramanather v. Paramanather*, 3 N. L. R. 79].

A suit may be brought before a guardian is appointed, and limitation counts from the date of the plaint and not from the appointment of the guardian [*Khem Marn v. Har Dayal*, I. L. R. 4 Alla. 37].

480 Every order made in an action or on any application before the court in or by which a minor is in any way concerned or affected without such minor being represented by a next friend or guardian for the action, as the case may be, may be discharged on application made on summary procedure for the purpose; and, if the proctor of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, it may on such application be discharged with costs to be paid by such proctor, provided he was duly made a respondent to the application.

No order to
affect minor
not
represented.

See section 444 of the Indian Code.

481 Any person being of sound mind and full age may be appointed next friend of a minor, provided his interest is not adverse to that of such minor and he is not a defendant in the action. Such appointment shall be made after application by way of summary procedure supported by affidavit, showing the fitness of the person proposed, and also that he has no interest adverse to the minor, and to such application the defendant shall be made respondent. And on the occasion of any such

Who may act
as next
friend.

application being made the minor should appear personally in court unless prevented by good cause, such as extreme youth or illness.

This section down to the word "action" in the 4th line is the same as section 445 of the Indian Code.

The application under this section for the appointment of a next friend must be accompanied by the plaint [*Fernando v. Fernando*, 2 C. L. R. 82; *Mahamado Umma v. Mohideen*, 1 S. C. R. 302]. Where an application under this section is made on insufficient materials, the defendant should not file answer, but move the court to strike the plaint off the file [*Mohamado Umma v. Mohideen*, 1 S. C. R. 302; 2 C. L. R. 163].

In an application under this section for the appointment of a next friend of a minor for the purpose of instituting an action on behalf of the minor, the intended defendant need not be made a respondent. The provision in the section as to making such defendant respondent applies to cases where an application to appoint a next friend is made in the course of or as incidental to an action [*ibid*].

A person who has been regularly appointed "next friend" under this section may sue without a certificate of curatorship under section 582 [*Uduma Lebbe v. Seyedu Ali*, 1 N. L. R. 1].

On cause
shown court
may remove
next friend.

482 If the interest of the next friend of a minor is adverse to that of such minor, or if he is so connected with a defendant whose interest is adverse to that of the minor as to make it unlikely that the minor's interest will be properly protected by him, or if he does not do his duty, or, pending the action, ceases to reside within the colony, or for any other sufficient cause, application may be made on summary procedure on behalf of the minor or by a defendant for his removal; and the court (if satisfied of the sufficiency of the cause assigned) may order the next friend to be removed accordingly.

See section 446 of the Indian Code.

Retirement
of next
friend.

483 Unless otherwise ordered by the court, a next friend shall not retire at his own request without first procuring a fit person to be put in his place and giving security for the costs already incurred.

The application for the appointment of a new next friend shall be on summary procedure supported by affidavit, showing the fitness of the person proposed, and also that he has no interest adverse to the minor, and to such application the defendant shall be made respondent.

See section 447 of the Indian Code.

484 On the death or removal of the next friend of a minor further proceedings shall be stayed until the appointment of a next friend in his place.

Death or removal of next friend.

Same as section 448 of the Indian Code.

485 If the proctor of such minor omits, within reasonable time, to take steps to get a new next friend appointed, any person interested in the minor or the matter at issue may, on summary procedure, apply to the court for the appointment of one, making the defendant a respondent to the application; and the court may thereupon appoint such person as it thinks fit.

Appointment of new next friend.

Same as section 449 of the Indian Code.

If a next friend be not appointed, and the suit is dismissed, defendant can get his costs from the minor [*Turner v. Turner*, 1 Stra. 708].

No person can be added as a "next friend" without his consent [see section 19].

486 A minor plaintiff, or a minor not a party to an action on whose behalf an application is pending, on coming of age must elect whether he will proceed with the action or application.

Minor's right of election on coming of age.

Same as section 450 of the Indian Code.

487 If he elects to proceed with it, he shall apply for an order discharging the next friend, and for leave to proceed in his own name.

Discharge of next friend on election to proceed.

The title of the action or application shall, upon such order being made, be altered so as to read thenceforth thus :

“ *A. B.*, late a minor, by *C. D.*, his next friend, but now of full age.”

Same as section 451 of the Indian Code.

Procedure on election of sole plaintiff to abandon on payment of costs.

488 If he elects to abandon the action or application he shall, if a sole plaintiff or sole applicant, apply for an order to dismiss the action or application, on re-payment of the costs incurred by the defendant, or respondent, or which may have been paid by his next friend.

Same as section 452 of the Indian Code.

Application to be *ex parte*.

489 Any application under section 487 or section 488 may be made *ex parte*; and the affidavit of facts upon which it is based must satisfy the court that the late minor has attained his full age.

See section 453 of the Indian Code.

Procedure on election of a co-plaintiff to repudiate.

490 A minor co-plaintiff on coming of age, and desiring to repudiate the action, must apply to have his name struck out as co-plaintiff; and the court, if it finds that he is not a necessary party, shall dismiss him from the action on such terms as to costs or otherwise as it thinks fit.

The next friend, as well as the defendant, shall be served with the petition of application as respondent, and it must be proved by affidavit that the late minor has attained his full age; the costs of all parties of such application and of all or any proceedings theretofore had in the action shall be paid by such persons as the court directs.

If the late minor be a necessary party to the action, the court may direct him to be made a defendant.

Substantially the same as section 454 of the Indian Code.

491 If any minor on attaining majority can prove to the satisfaction of the court that an action instituted in his name by a next friend was unreasonable or improper, he may, if a sole plaintiff, apply by way of summary procedure to have the action dismissed.

Procedure when ex-minor applies to have action dismissed as unreasonable or improper.

Notice of the application shall be served on all the parties concerned, including the next friend, and the court, upon being satisfied of such unreasonableness or impropriety, may grant the application, and order the next friend to pay the costs of all parties in respect of the application and of anything done in the action.

Same as section 455 of the Indian Code.

492 Nothing in the foregoing sections shall affect the right of any minor to prosecute any proceedings in a court of requests for any money which may be due to him for wages or piecework, or for work as a servant, artificer, or labourer, in the same manner as if he were of full age.

Minor may in person sue for wages.

493 An order for the appointment of a guardian for the action may be obtained upon application on summary procedure in the name and on behalf of the minor or by the plaintiff. Such application must be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in question in the action adverse to that of the minor, and that he is a fit person to be so appointed.

Application for appointment of guardian *ad litem*.

On the occasion of such an application being made, the minor ought to appear personally in court unless prevented by good cause, such as extreme youth or illness, from doing so.

See section 456 of the Indian Code.

A person cannot be appointed guardian *ad litem* against his will [*Jadow v. Chhajen*, I. L. R. 5 Bom. 306], but once appointed his appointment lasts for the whole of the litigation, or until it is revoked by the court [*Jwala v. Pirbhu*, I. L. R. 14 Alla. 35].

When officer
of court may
be appointed.

494 When there is no other person fit and willing to act as guardian for the action, the court may appoint any of its officers to be such guardian, provided that he has no interest adverse to that of the minor.

See section 456 of the Indian Code.

Co-defendant
may be
appointed.

495 A co-defendant of sound mind and of full age may be appointed guardian for the action, if he has no interest adverse to that of the minor; but neither a plaintiff nor a married woman can be so appointed.

Same as section 457 of the Indian Code.

Court may
remove
guardian *ad
item*.

496 If the guardian for the action of a minor defendant does not do his duty, or if other sufficient ground be made to appear, the court may remove him and may order him to pay such costs as may have been occasioned to any party by his breach of duty.

Same as section 458 of the Indian Code.

Costs can be recovered from a person acting as guardian if he has acted improperly [*Goolam Hossein v. Fatmebai*, I. L. R. 5 Bom. 391], unless he has been appointed without his consent [*Jadur v. Chhagan*, I. L. R. 5 Bom. 306].

Death of
guardian.

497 If the guardian for the action dies pending such action, or is removed by the court, the court shall appoint a new guardian in his place.

Same as section 459 of the Indian Code.

Procedure for
execution of
decree
against minor
heir.

498 When the enforcement of a decree or order is applied for against the heir or representative, being a minor, of a deceased party, a guardian for the action of such minor shall be appointed by the court, on an application of summary procedure duly made for this purpose, and the decree-holder shall then serve on such guardian notice of such application.

See section 460 of the Indian Code.

499 No sum of money or other thing shall be received or taken by a next friend or guardian for the action on behalf of a minor at any time before decree or order, unless he has first obtained the leave of the court, and given security to its satisfaction that such money or other thing shall be duly accounted for to, and held for the benefit of, such minor.

See section 461 of the Indian Code.

When court may allow next friend funds for suit.

500 No next friend or guardian for the action shall, without the leave of the court, enter into any agreement or compromise on behalf of a minor with reference to the action in which he acts as next friend or guardian.

Next friend may not compound action without leave of court.

Any such agreement or compromise entered into without the leave of the court shall be voidable against all parties other than the minor.

Same as section 462 of the Indian Code.

An agreement by the guardian that an issue should be determined by the oath of the plaintiff does not require sanction [*Chengal v. Venkata*, I. L. R. 12 Mad. 483]; nor does it apply to the case of a guardian withdrawing objections under the advice of counsel [*Mirali v. Rehmoobhoy*, I. L. R. 15 Bom. 594].

The sanction must be express, not implied [*Raja Gopal v. Muttu Palem*, I. L. R. 3 Mad. 103].

A court should not make a decree by consent against a minor without ascertaining that it is for the benefit of the minor that such a decree should be pronounced [*Ram Churn v. Mungul*, 16 W. R. 232].

501 The provisions contained in this chapter shall, *mutatis mutandis*, apply in the case of persons of unsound mind, adjudged to be so under the provisions of this Ordinance or under any law for the time being in force.

This chapter to apply to persons of unsound mind.

See section 463 of the Indian Code.

502 For the purposes of this chapter, a minor shall be deemed to have attained majority or full age on his attaining the age of twenty-one years, or on marriage, or on obtaining letters of *venia ætatis*.

Majority, what is.

Chapter 36. Actions by and against Naval and Military Men in Service.

Actions by or
against naval
and military
men.

503 When any naval or military officer or any sailor or soldier, actually serving the Government in a naval or military capacity, is a party to an action, and cannot obtain leave of absence for the purpose of prosecuting or defending the action in person, he may authorise any person to sue or defend in his stead.

Authority to
agent.

The authority shall be in writing, and shall be signed by the party in the presence of—

(a) His commanding officer, or of the next subordinate officer if the party be himself the commanding officer ; or

(b) Where the party is serving in military or naval staff employment, the head or other superior officer of the office in which he is employed. Such commanding or other officer shall countersign the authority, which shall be filed in court.

When so filed, the countersignature shall be sufficient proof that the authority was duly executed, and that the party by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the action in person.

Explanation.—In this chapter the expression “commanding officer” means the officer in actual command for the time being of any ship, regiment, corps, detachment, or naval or military depôt to which the party belongs.

See section 465 of the Indian Code.

The written authority must be filed in the action [*Mahomed Saib v. Aggas*, I. L. R. 10 Mad. 319].

Agent may
sue or defend
in person.

504 Any person authorised by such party to prosecute or defend an action in his stead may prosecute or defend it in person in the same manner as such party could do if present ; or he may appoint a proctor to prosecute or defend the action on behalf of such party.

See section 466 of the Indian Code.

505 Processes served upon any person authorised by any party under section 503, or upon any proctor appointed as aforesaid by such person to act for or on behalf of such party, shall be as effectual as if they had been served on the party in person or on his proctor; and no process in the action shall be served upon such party personally without express order of court.

Service of process in such cases.

See section 467 of the Indian Code.

506 When any naval or military officer or any sailor or soldier is a defendant, a copy of the summons shall be sent by the fiscal to his commanding officer for the purpose of being served on him.

Copy of summons may be sent to commanding officer for service.

The officer to whom such copy is sent shall cause it to be served on the person to whom it is addressed, if practicable, and shall return it to the fiscal with the written acknowledgment of such person endorsed thereon.

If from any cause the copy cannot be so served, it shall be returned to the fiscal by whom it was sent, with information of the cause which has prevented the service.

See section 468 of the Indian Code.

507 If, in the execution of a decree, a warrant of arrest or other process is to be executed within the limits of a cantonment, garrison, or naval or military station, the officer charged with the execution of such warrant or other process shall deliver the same to the commanding officer.

Warrant of arrest may likewise be delivered for execution.

The commanding officer shall, if the person named therein is by law liable to arrest, back the warrant or other process with his signature, and shall in the case of a warrant of arrest cause such person, if within the limits of his command, to be arrested and delivered to the officer so charged.

Section 144 of the Army Act, 1881 [see, as to its applicability to Ceylon, the Army (Annual) Act, 1899] provides as follows :—

(1) A soldier of Her Majesty's Regular Forces shall not be liable to be taken out of Her Majesty's service by any process, execution, or order of any court of law or otherwise, or to be compelled to appear in person before any court of law, except in respect of the following matters, or one of them ; that is to say, (a) on account of a charge of or conviction for crime ; (b) on account of any debt, damages, or sum of money, when the amount exceeds thirty pounds over and above all costs of suit * * * * (4)

The amount of the debt, damages, or sum shall be proved for the purpose of any process issued before the court has adjudicated on the case by an affidavit of the person seeking to recover the same or of some one on his behalf, and such affidavit shall be sworn, without payment of any fee, in the manner in which affidavits are sworn in the court in which proceedings are taken for the recovery of the sum, and a memorandum of such affidavit shall, without fee, be endorsed upon any process or order issued against a soldier. And section 177 provides that when any force of volunteers or of militia or any other force is raised in India or in a Colony, any law of India or the Colony may extend to the officers, non-commissioned officers, and men belonging to such force, whether within or without the limits of India or the Colony ; and where any such force is serving with part of Her Majesty's regular forces, then so far as the law of India or the Colony has not provided for the government and discipline of such force, this Act and any other Act for the time being amending the same shall, subject to such exceptions and modifications as may be specified in the general orders of the General Officer Commanding Her Majesty's Forces with which such force is serving, apply to the officers, non-commissioned officers, and men of such force in like manner as they apply to the officers, non-commissioned officers, and men respectively mentioned in the two preceding sections of this Act.

In *Murgappa Chetty v. Horsfall* [S. C. Civ. Min. 1st February, 1900] it was held that the defendant, who had volunteered for service as a soldier in South Africa and was under orders to sail on active service, was not liable to be arrested in execution of a warrant in mesne process issued under section 650 of the Civil Procedure Code.

See Voet ad Pand., 2.4.39.

Chapter 37.

Actions of
account.

Actions of Account.

508 When the claim which is made in the plaint, or is set up in the answer, is such that the action cannot be disposed of, or a complete and final decree

made in the matter thereof between the parties without the taking of accounts, or the making inquiry into facts, or the demarcation of land, or the realisation of assets, as the case may be, it shall be competent to the court to adjudicate piecemeal upon the matters in issue, and in such adjudications to make interlocutory decrees or orders of a final character between the parties at hearings had by successive adjournments; and, in particular, to take any accounts, and to make an inquiry into facts separately from the remaining matter of the action on a day to be appointed for the purpose, and to issue the necessary directions or commissions for the demarcation of land or realisation of assets, and to adjourn the hearing from time to time for further orders or directions, or for final determination, to such dates as may be necessary or convenient to enable the accounts to be taken, the inquiries made, and the demarcation of land or realisation of assets, as the case may be, to be effected, in the interval.

509 In any such case the order of adjournment for the purpose of the account being taken, inquiries made, or commissions or directions issued, must adjudicate (either by consent or upon admissions of the parties, or upon other sufficient evidence) upon so much of the rights of, or of the fiduciary relations between, the parties, which are at issue in the action, as may suffice to give rise to the liability of the respective parties affected by the order to account, or may serve to render the inquiries, directions, or commissions thereby directed proper and necessary.

Interlocutory
order for
taking
accounts, &c.

510 Every order directing an account to be taken, or giving leave to a party to falsify or to surcharge an account, shall appoint a day for the filing of the account or of the document of falsification or surcharge, and also a subsequent time for the opposing party to

Form and
scope of order.

file objections thereto, and again a later time for the hearing and determination of the issues between the parties arising out of the objections, and for the finding on the footing of such determination of the state of the account directed to be taken.

The taking
of the
accounts.

511 The account directed to be taken, before it is filed, must be verified on oath or affirmation by the accounting party. Objections to the account may be filed by any party concerned in the right taking of the accounts, and may be directed as well to adding new entries or enhancing existing entries on the debit side of the accounting party, as to falsifying the account given by him in any particular. And the trial of the issues arising out of the objections to the account shall conform, as nearly as may be, in regard to the order and method of proceeding and the taking of evidence, to the rules hereinbefore laid down for the trial of a regular action.

Reasonable
care to be
taken in
appointing
the days for
the purpose.

512 The day for filing the account directed to be taken, and the times for filing the objections thereto, and for the hearing and determination of the issues arising thereout, shall respectively be fixed with a due regard to the circumstances of the matter and the situation of the parties therein, so that reasonable opportunity may be afforded to the accounting party to make out his account, to the opposing party to examine the same and to satisfy himself in respect to its correctness, and to all parties to prepare for trial.

Procedure
where
accounting
party makes
default.

513 In the event of the accounting party not duly filing his account, and not satisfying the court that there is just cause for his default, the court shall proceed with the hearing of the matter of the account and adjudicate upon the same on the day appointed therefor by finding the actual state of the account directed to be taken upon such materials as may be

furnished by the opposing party. Provided, nevertheless, that any reasonable extension of time which may be *bonâ fide* required by any party, either for filing accounts or objections thereto, or for preparing for trial, may be granted by the court on such terms as it may think proper, if such extension of time be applied for at the earliest possible moment, upon materials showing good and sufficient ground, and upon notice to the other parties concerned. Proviso.

514 When an order is made in an action for an inquiry into facts, the foregoing rules shall, *mutatis mutandis*, apply to the making of the order, the filing of the state of facts and of the objections thereto, or counterstate of facts, and to the trial of the issues arising thereout respectively, so nearly as reasonably may be. This chapter to apply to an order for an inquiry.

515 When the hearing of an action is adjourned for the intermediate taking of accounts, making of inquiries, or execution of commissions,* or of other directory orders, the interval of adjournment shall be adjusted with immediate reference to the proceedings prescribed by the foregoing rules for such interlocutory matter, so as to allow of its being conveniently completed before the resumption of the hearing so adjourned. And the order for adjournment shall include or comprehend the orders and directions requisite under these rules for the taking of the accounts or executing the other matters for which the adjournment is made. Provided, nevertheless, that any reasonable extension of the time of adjournment which may seem to the court necessary, or which may be *bonâ fide* required by any party, in consequence of extension of time being granted for, or of delay in, or prolongation of, the proceedings of the interlocutory matters, or upon other good and sufficient ground shown by proper evidence, may be ordered by the court either on the Adjournment of the hearing until after the accounts, &c., shall have been taken.

day to which the hearing is adjourned, or upon any other day, provided reasonable notice of the application to the court for the extension of the time of adjournment be afforded to all parties.

The provisions of this chapter apply only to the case of persons dying since the Code came into operation [*Muttupillai v. Sellomma*, 9 S. C. C. 179. *In re the Goods of Meera Lebbe*, 1 C. L. R. 99].

Chapter 38.

Deposits of
the will of
deceased.

Testamentary Actions.

516 When any person shall die leaving a will in Ceylon the person in whose keeping or custody it shall have been deposited, or who shall find such will after the testator's death, shall produce the same to the district court of the district in which such depository or finder resides, or to the district court of the district in which the testator shall have died, as soon as reasonably may be after the testator's death. And he shall also make oath or affirmation, or produce an affidavit (form No. 81, schedule II.) verifying the time and place of the death,*and stating (if such is the fact) that the testator has left property within the jurisdiction of that or any other, and in that event what, court, and the nature and value of such property: or, if such is the fact, that such testator has left no property in Ceylon.

The will so produced shall be numbered and initialled by the secretary, and deposited and kept in the record-room of the district court.

Penalty on
neglect.

517 Any person liable to produce any will to any court under the provisions of the last preceding section, who shall wilfully omit to produce such will, or to furnish the information thereby required, shall be guilty of an offence and liable to a fine not exceeding one thousand rupees.

Who may
apply for
probate or
administra-
tion.

518 When any person shall die leaving a will under or by virtue of which any property in Ceylon is in any way affected, any person appointed executor

therein may apply to the district court of the district within which the testator died, or, if the testator died out of Ceylon and the applicant has obtained an order of the Supreme Court appointing any court to have sole testamentary jurisdiction over his estate or effects, to such court, to have the will proved, and to have probate thereof issued to him : also any person interested, either by virtue of the will or otherwise, in having the property of the testator administered, may apply to such court to have the will proved, and to obtain grant to himself of administration of the estate with copy of the will annexed. If any person who would be entitled to administration is absent from the island, a grant of letters of administration with or without the will annexed, as the case may require, may be made to the duly constituted attorney of such person.

519 Upon any such application being made, and, in every case in which the estate of the testator amounts to or exceeds in value one thousand rupees, whether any such application shall have been made or not, it shall be obligatory on the court to, and the court shall, issue probate of the will to the executor or executors named therein ; or if there is no executor resident in the island competent and willing to act, the court shall issue letters of administration with or without the will annexed, as the case may require, to some person who by the provisions of the last preceding section is competent to apply for the same, or to some other person who, in the opinion of the court, by reason of consanguinity, amount of interest, the safety of the estate, and probability that it will be properly administered, is a proper person to be appointed administrator : and in every such case letters of administration may be limited or not in manner hereinafter provided, as the court thinks fit. The grant of such letters shall be subject to the rules and regulations hereinafter

Probate or
administra-
tion
compulsory
where estate
over one
thousand
rupees.

provided with regard to such grants in other cases ; and in the judgment by which such grant is made the court shall adjudicate upon the facts which constitute the grounds of the appointment.

See note to section 530.

In the case of a person married in community of property dying leaving his or her spouse, as the case may be, regard must be had to the entire estate and not to the deceased moiety only in determining whether administration is necessary [*Nonohamy v. Perera*, 2 C. L. R. 153].

When
secretary
of the court
may be
appointed.

520 Where there is no person fit and proper in the opinion of the court to be appointed administrator in manner in the last preceding section provided, or no such person is willing to be so appointed, and not in any other case, the court shall appoint the secretary of the court such administrator.

Security.

521 In every case in which it is found necessary, whether by reason of such executor as aforesaid not applying for probate, or by reason of there being no executor resident in the island competent and willing to act, or by reason of no person who is competent under section 518 to apply for letters of administration so applying, that any such person as is in section 519 mentioned, or the secretary of the court, should be appointed administrator, the court shall take from such person or secretary security for the due administration of the estate in manner in section 538 mentioned, and it shall not in any such case be competent for the court to dispense with such security under the provisions of section 541.

Secretary
when allowed
to proceed on
blank.

522 In every case in which letters of administration have so as aforesaid been granted to the secretary of the court, it shall be competent for the court in its discretion to allow such secretary to proceed without supplying the stamps required by law to be supplied by executors and administrators in

proceedings taken under this chapter, until such time as assets of the estate sufficient to defray the cost of the same shall have come to his hands. The amount which would have been payable by such secretary as administrator on any proceedings in which he has been so allowed to proceed on blank shall be calculated by the court, and shall be a first charge on all the assets of the estate.

523 In the case of a conflict of claims to have the will proved and probate or grant of administration issued, the claim of an executor or his attorney shall be preferred to that of all others, and the claim of a creditor shall be postponed to the claim of a residuary legatee or devisee under the will. And in the like case of a conflict of claims for grant of administration where there is intestacy, the claim of the widow or widower shall be preferred to all others, and the claim of an heir to that of a creditor.

To whom
grant in
either case
should be
made.

A widow is, under this section, entitled to administration in preference to the next of kin, notwithstanding that the court is satisfied, on a conflict of claims to administration between her and one of the next of kin, that she has been a party to an attempt to deprive the estate of some of its assets. An inquiry as to whether any particular asset is part of the estate, and as to the conduct of the widow with reference thereto, is premature at the stage at which such conflicting claims are considered [*In re the Estate of Ahamado Lebbe*, 2 C. L. R. 179].

524 Every application to the district court to have the will of a deceased person proved shall be made on petition by way of summary procedure, which petition shall set out in numbered paragraphs the relevant facts of the making of the will, the death of the testator, the heirs of the deceased to the best of the petitioner's knowledge, the details and situation of the deceased's property, and the grounds upon which the petitioner is entitled to have the will proved; the petition shall also show whether the petitioner claims as creditor,

Mode of
application
and proof in
case of a will.

executor, administrator, residuary legatee, legatee, heir, devisee, or in any and what other character.

If the will is not already deposited in the district court in which the application is made, it must either be appended to the petition, or must be brought into court and identified by affidavit, with the will as an exhibit thereto, or by parol testimony at the time the application is made.

Every person making, or intending to make, an application to a district court under this section to have the will of a deceased person proved, which will is deposited in another district court, is entitled to procure the latter court to transmit the said will to the court to which application is to be made, for the purpose of such application.

Application
to be made
on affidavits.

Also the application must be supported by sufficient evidence either in the shape of affidavits of facts, with the will as an exhibit thereto or of oral testimony, proving that the will was duly executed according to law, and establishing the character of the petitioner according to his claim.

Affidavit of
no opposition.

525 If the petitioner has no reason to suppose that his application will be opposed by any person, he may file with his petition an affidavit to that effect, and may omit to name any person in his petition as respondent.

Court, if
satisfied with
proof, to
make order
nisi declaring
will proved.

526 Upon the application being made, if the court is of opinion that the evidence adduced is sufficient to afford *prima facie* proof of the due making of the will and of the character of the petitioner, it shall make an order *nisi* declaring the will to be proved, which order shall be served upon the respondent, if any, and upon such other person as the court shall think fit to direct, and shall come on for final hearing and disposal on a day to be named therein.

Citations.

527 If the applicant claims as the executor or one of the executors of the will, and asks that probate may be issued to him, the order *nisi* shall declare that he is executor, and shall direct the issue of probate to him accordingly.

Order *nisi*
to direct
probate.

528 If the applicant claims in any other character than that of executor, and asks that the administration of the deceased's property be granted to him, then the order *nisi* shall include a grant to the applicant of a power to administer the deceased's property according to the will, with a copy of the will annexed.

Grant of
administra-
tion with
copy of will
annexed.

529 In the case of an application for probate, if no respondent is named in the petition, the court may in its discretion make the order absolute in the first instance.

When court
may make
order
absolute in
the first
instance.

530 Every application to the district court for grant of administration of a deceased person's property, where the deceased has died without making a will, or where the will cannot be found, shall be made on petition by way of summary procedure, which petition shall set out in the numbered paragraphs prescribed by section 524 the relevant facts of the absence of the will, the death of the testator, and the heirs of the deceased, to the best of the petitioner's knowledge; the petition shall also show the character in which the petitioner claims and the facts which justify his doing so.

Mode of
application
and proof for
grant of ad-
ministration
in absence of
a will.

The application shall also be supported by sufficient evidence, either in the shape of affidavits of facts or of oral testimony, to afford *primâ facie* proof of the material allegations in the petition, and shall name the next of kin of the deceased as respondents.

The question whether a person not named as a respondent to the petition for letters of administration is an heir of the intestate may be tried as an issue between the applicant and opponent at the earliest opportunity [*Ram Menica v. Dingiri Banda*, 3 N. L. R. 173].

In the form in the Code [see Form No. 87] of letters of administration to be issued under this section and section 519 the administrator is prohibited from selling the immovable property of the estate unless specially authorised to do so by the court. Where, however, an administrator has an absolute and unfettered grant of administration, he can sell immovable property on her own responsibility. If he sells improperly or unnecessarily, he may be responsible to those concerned for loss thereby occasioned, and, moreover, any one concerned may apply to have the estate administered under the direction of the court [*In re the Goods and Chattels of Jayawardene*, 1 S. C. R. 83].

Court
declaring
petitioner's
status to
make order
nisi for issue
of grant.

531 Upon the application for grant of administration being made, if the court is of opinion that the material allegations of the petition are proved, it shall make an order *nisi* declaring the petitioner's status accordingly, and making the grant prayed for, which order shall be served upon the respondent and upon such other persons as the court shall think fit to direct, and shall come on for final hearing and disposal on a day to be named therein.

Citation.

Order *nisi* to
be advertised.

532 In all cases of application for the grant of the administration of the deceased's property, whether with or without a will, the court shall, whether a respondent is named in the petition or not, direct the order *nisi* to be advertised in the *Gazette*, and twice in a local paper before the day of final hearing : the paper to be selected by the court with the object that notice of the order should reach all persons interested in the administration of the deceased's property. Provided that the court may in its discretion direct such other mode of advertisement in lieu of such publication as to it seems sufficient.

At final
hearing, on
objection,
court shall
frame issues.

533 If on the day appointed for final hearing, or on the day to which it may have been duly adjourned, the respondent or any person upon whom the order *nisi* has been directed to be served, or any person then appearing to be interested in the administration

of the deceased's property, satisfies the court that there are grounds of objection to the application, such as ought to be tried on *viva voce* evidence, then the court shall frame the issues which appear to arise between the parties, and shall direct them to be tried on a day to be then appointed for the purpose under section 386.

The procedure in the trial of issues framed under this section is the ordinary procedure in a regular action : that is to say, the person who wishes to prove anything should begin ; and at such trial it is competent to the respondent to make use of the evidence adduced by the petitioner to obtain the order *nisi* to rebut the petitioner's case [*In re the Last Will of Carolis Dias*, 2 N. L. R. 66 ; *In re the Last Will of Vinasi Ellupalayar*, 2 N. L. R. 126].

When a party respondent to an order *nisi* satisfies the court which granted that order that, on the material before it, it was not competent to make that order, the judge can and should discharge it. If an order *nisi* is properly supported, and the respondent has cause to show against its being made absolute, he must satisfy the court by evidence, either by affidavit or oral testimony, that he has good cause. When the respondent has put forward his evidence, the court may do one of two things : either adjourn the matter to enable the petitioner, if he asks to be allowed to do so, to adduce additional evidence ; or, if the court thinks it necessary, it may frame issues to be tried between the petitioner and the respondent. It will depend on the issues framed whether the petitioner or the respondent is to begin [PER WITHERS, J., in *In re the Last Will of Carolis Dias*, 2 N. L. R. 66. See also *In re the Last Will of Vinasi Ellupalayar*, 2 N. L. R. 126].

An objection under this section to the genuineness of a will should be supported by affidavit or oral evidence on oath, except in cases in which a paper propounded as a will discloses on the face of it indications exciting serious suspicion as to its authenticity [*In re the Last Will of Venasi Ellupalayar*, 2 N. L. R. 126].

Before issues are framed under this section the court must be satisfied that a *prima facie* case against granting the application has been made out. It is not sufficient for the court to be satisfied that somebody objects, or for somebody to get up and say that the will is a forgery ; something more is necessary from which the court can infer that a substantial case against the application has been made out [*In the Matter of the Estate of Sinne Tamby*, 2 N. L. R. 214].

When order
nisi shall be
made
absolute; and

when
discharged.

Proviso.

534 If at the final hearing, or on the determination of the issues thus framed, it shall appear to the court that the *primâ facie* proof of the material allegations of the petition has not been rebutted, then the order *nisi* shall be made absolute, and probate or grant of administration with the will annexed, or grant of administration only, as the case may be, shall issue accordingly, subject to the conditions hereinafter prescribed. If, on the other hand, it shall then appear to the court that the *primâ facie* proof of any material allegations in the petition has been rebutted, the order *nisi* shall be discharged, and the petition dismissed. And in the event of the respondent or objector having at such hearing or trial of issues established his right to have probate or grant of administration of the deceased's estate issued to him instead of to the petitioner, then the court shall further make an order to that effect in his favour.

Provided, however, that the dismissal of the petition shall not be a bar to a renewal of the application by the petitioner as long as grant either of probate of the deceased's will, or of administration of his property, shall not have been made, either on the occasion of this application or subsequently thereto, to some other person than the petitioner.

The word "rebutted" in this section does not refer to the trial of the issues, but to the final result of the proceedings [*In re the Last Will of Carolis Dias*, 2 N. L. R. 66].

Under the proviso to this section it is within the power of a District Judge to receive a new application for letters of administration after one application has been decided upon as between the same parties; but he is not obliged to do so. The proviso will receive effect in cases where there is a change of circumstances, or when the application can be supported by additional evidence, or on grounds different from those considered and adjudicated upon by the court [*In the Matter of the Goods and Effects of Appuhamy*, 2 N. L. R. 178].

Who may file
a caveat.

535 At any time after the filing of a petition in a district court, asking to have the will of a deceased

person proved, or that the grant of probate thereof or of administration of a deceased person's property be made, and before the final hearing of the petition, it shall be competent to any person, interested in the said will or in the said deceased person's property or estate, though not a respondent on the face of the petition, to intervene, by filing in the same court a *caveat* against the allowing of the petitioner's claim or a notice of opposition thereto, and any order *nisi* which may be made upon such petition shall be served upon such objector as if he had been originally named a respondent in the petition.

Effect thereof.

It would be too late to enter a caveat under this section after an order absolute in the first instance under section 529. If the probate has been granted wrongly, it may be recalled under section 536 [*In re the Last Will of Ferdinandus*, 1 N. L. R. 245].

536 In any case where probate of a deceased person's will has issued on an order absolute in the first instance, or a grant of administration of a deceased person's property has been made, it shall be competent to the district court to recall the said probate or grant of administration, and to revoke the grant thereof, upon being satisfied that the will ought not to have been held proved, or that the grant of probate or of administration ought not to have been made; and it shall also be competent to the district court to recall the probate or grant of administration at any time upon being satisfied that events have occurred which render the administration thereunder impracticable or useless.

Power of district court to recall or revoke probate or grant of administration.

537 All applications for the recall or revocation of probate or grants of administration shall be made by petition, in pursuance of the rules of summary procedure hereinbefore prescribed; and no such application shall be entertained unless the petitioner shows in his petition that he has such an interest in the estate of the deceased person as entitles him in the opinion of the court to make such application.

Applications therefor to be by petition.

Inventory
and
valuation.

538 In every case where an order absolute has been passed by a district court declaring any person entitled to have issued to him probate of a deceased person's will, or grant of administration of a deceased person's property, it shall be the duty of the said person, executor, or administrator, in whose favour such order is made, to take the oath of an executor or administrator according to the form prescribed in schedule II. hereto, and thereafter to file in court, within a time to be appointed therefor in the order, an inventory of the deceased person's property and effects, with a valuation of the same, such inventory and valuation to be verified on oath or affirmation by the said executor or administrator in the form 92 given in the said schedule, and where the court requires it to enter into a bond with two good and sufficient sureties in the form 90 given in the said schedule, for the due administration of the deceased person's property.

Security.

The bond so entered into shall render the sureties responsible in any suit brought for the administration of the deceased person's property for all deficiencies, depreciation, or loss of that property attributable to the default of their principal, and liable to make good the same to the same extent and in like manner as if the said default were their own, subject, however, to the conditions of the bond in that behalf.

Limited
probate and
adminis-
tration.

539 It is competent to the district court to make a grant of probate or a grant of administration, limited either in respect to its duration, or in respect to the property to be administered thereunder, or to the power of dealing with that property which is conveyed by the grant, in the following cases :

- (a) When the original will of the deceased person has been lost since the testator's death, but a copy has been preserved, probate of that copy may be granted, limited until the original be brought into court.

- (b) In the like event, and with the like limitation, if no copy has been preserved, probate of a draft will may be granted, or if in addition no draft is available, then probate of the contents or of the substance and effect of the will, so far as they can be established by evidence, may be granted.
- (c) When the original will is in the hands of some person residing out of the island, who cannot be compelled to give it up to the executor, and if the executor produces a copy, then probate of that copy may be granted, limited until the original be brought into court. If, however, the will has been duly proved out of the island, probate may be granted to the executor on a proper exemplification of the foreign probate without any limitation in the grant.
- (d) If the sole executor of a will resides, or if there are more executors than one and all the executors reside, out of the island, or such of the executors as reside in the island decline to act, then the court may grant administration with copy of the will annexed to any person within the island, as attorney of the executor or of the executors, who shall be appointed for that purpose by power of attorney, the grant so made being limited for the use and benefit of the principal until the executor or one of the executors comes in and obtains probate for himself. If the document admitted to proof in this case be a copy of or substitute for the original, on account of the original itself not being forthcoming by reason of one of the just-mentioned causes, the grant shall further be limited until the original is brought into court. Provided also, that if the person

applying for the grant is not the attorney of all the executors, where there are more than one, the grant of administration shall not be made to him until the remaining executors have declined to act.

(e) In the case of a will, and there being no executor within the island willing to act, grant of administration with copy of the will annexed may be made to the attorney of an absent residuary legatee, or heir, limited until the principal shall come in and obtain administration for himself; or in the like case, the grant may be made to the guardian of a minor residuary legatee, within the island, limited during the minority, or to the manager of the estate of a lunatic residuary legatee within the island, limited during the lunacy.

(f) In the case of intestacy, grants of administration of the deceased person's property may be made, limited in like manner to the guardian of a minor heir or to the manager of the estate of a lunatic heir.

(g) The court may grant probate or administration limited to any particular property or for any particular purpose, in any case where it considers that a larger grant is unnecessary.

In all the foregoing cases, the material and relevant facts necessary to justify the court in making the limited grant must be set out in the petition of application, and must be established by *prima facie* evidence before the order is made, as is prescribed in section 524.

Power of
adminis-
tration when
not limited.

540 If no limitation is expressed in the order making the grant, then the power of administration, which is authenticated by the issue of probate, or is

conveyed by the issue of a grant of administration, extends to every portion of the deceased person's property, movable and immovable, within this colony, or so much thereof as is not administered, and endures for the life of the executor or administrator or until the whole of the said property is administered, according as the death of the executor or administrator, or the completion of the administration, first occurs.

541 In all cases of the issue of probate security shall not be required, unless for some special reason the court deems that security is absolutely necessary for the protection of the estate; and in cases where the grant of administration is limited in regard to the dealing with the property which is the subject thereof, it shall be within the discretion of the court to dispense with the giving of the bond under section 538; and in all cases the court may limit the amount secured by the bond to the value of the movable property, which appears to the court likely to come into the hands of the administrator and to be liable to misappropriation. Provided that every order, dispensing with the bond or limiting the amount to be secured thereby in cases of administration, or requiring security in cases of probate, shall adjudicate upon the facts upon which the court intends it to rest.

Court may dispense with security.

Proviso.

542 When any person shall die in Ceylon without leaving a will, it shall be the duty of the widow, widower, or next of kin of such person, if such person shall have left property in Ceylon amounting to or exceeding in value one thousand rupees, within one month of the date of his death to report such death to the court of the district in which he shall have so died, and at the same time to make oath or affirmation or produce an affidavit verifying the time and place of such death, and stating if such is the fact that the intestate has left property within the jurisdiction of

Person dying intestate, death to be reported by next of kin.

that or any other (and in that event, what) court, and the nature and value of such property.

This section makes the widow or the next of kin liable. The duty seems first to be laid on the widow, and if there be no widow then on the next of kin. Therefore both should not be convicted unless it is proved that they acted in concert [*Toussaint v. Alimakando*, 1 N. L. R. 305].

Penalty for neglect.

543 Every person made liable to report any death under, or to furnish any information required by, section 542, who shall wilfully omit to report such death or to furnish such information within the time therein prescribed therefor, shall be guilty of an offence, and liable to a fine not exceeding one thousand rupees.

Where a deceased left property exceeding Rs. 1,000 in value and minor children, a prosecution for not reporting his death under this section does not lie against the adult brothers of the deceased. It is only when some fraud has been perpetrated that the provisions of this and the preceding section should be enforced [*Mudianse v. Appuhamy*, 1 N. L. R. 47]. The best working provision regarding the reporting of deaths is to be found, not in these sections but in Ordinance No. 18 of 1887, section 18 [*ibid*].

In order to sustain a charge under this section it is necessary to prove that the accused is the lawful widow or next of kin of the deceased, that he died intestate, and that the accused wilfully omitted to report his death [*Toussaint v. Alimakandu*, 1 N. L. R. 305].

Who may apply for administration in case of intestacy.

544 In any case where a person is so reported to have died intestate, and also in any case in which the applicant produces an order of the Supreme Court appointing any court to have sole testamentary jurisdiction over the estate or effects of any person who has died out of Ceylon intestate as to any property in Ceylon, any person interested in having the estate of such intestate administered may apply to such court for grant to himself of letters of administration; and the court shall have power, having regard, where there is a conflict of claims, to the provisions of section 523 to appoint such person administrator.

545 In case no such person shall apply for letters of administration, and it appears to the court necessary or convenient to appoint some person to administer the estate or any part thereof, it shall be lawful for the court in its discretion, and in every such case where the estate amounts to or exceeds in value one thousand rupees it shall be obligatory on such court to appoint some person, whether he would under ordinary circumstances be entitled to take out administration or otherwise, to administer the estate: and all the provisions of sections 519 to 521, both inclusive, shall apply, so far as the same can be made applicable, to any such appointment.

In event of no application, court may appoint.

Compulsory, where estate is over one thousand rupees.

546 If any person shall die leaving property in the island, the judge of the court of any district in which such property shall be situate shall, on the facts being verified to his satisfaction and it being made to appear that there is not resident, within the local limits of his jurisdiction, some next of kin or other person entitled to administration of the estate of the person so dying, issue letters *ad colligenda* in the form 91 in the schedule II. hereto annexed, to one or more responsible persons to take charge of such property until the same shall be claimed by some executor or administrator lawfully entitled to administer the same.

Issue of letters *ad colligenda*.

547 No action shall be maintainable for the recovery of any property, movable or immovable, in Ceylon belonging to or included in the estate or effects of any person dying testate or intestate in or out of Ceylon, where such estate or effects amount to or exceed in value the sum of one thousand rupees, unless grant of probate or letters of administration duly stamped shall first have been issued to some person or persons as executor or administrator of such testator or intestate; and in the event of any such property being transferred without such probate or administration being so first

No action maintainable to recover property of testator or intestate over one thousand rupees unless probate or administration has been taken out.

Transfer of
such
property,
where an
offence.

Penalty.

taken out, every transferor and transferee of such property shall be guilty of an offence, and liable to a fine not exceeding one thousand rupees; and in addition to any fine imposed under the provisions of this section it shall be lawful for the Crown to recover from such transferor and transferee, or either of them, such sum as would have been payable to defray the cost of such stamps as would by law have been necessary to be affixed to any such probate or letters of administration. And the amount so recoverable shall be a first charge on the estate or effects of such testator or intestate in Ceylon, or any part of such estate or effects, and may be recovered by action accordingly.

The provisions of this section do not apply to actions brought against the estate of a deceased person, but only to actions brought on behalf of the estate to recover something claimed as belonging or due to such person [*Sevalingam v. Kumarihamy*, 9 S. C. C. 181; 1 C. L. R. 74].

This section does not apply to cases in which the plaintiff, after the death of the late owner, got into peaceful possession of the deceased's property, whether movable or immovable, and where the cause of action is the dispossession of the plaintiff of property lawfully in his possession, and not the wrongful detention by the defendant of the deceased's property of which the plaintiff never had possession [*Uduma Lebbe v. Seyadu*, 2 N. L. R. 348].

Seemle, that this section does not prohibit an heir from asking merely for a declaration of title to his ancestor's lands [*ibid*].

In a suit by a creditor against the estate of a deceased debtor who has died leaving a will, his heirs on intestacy do not represent his estate, and the suit is bad unless the estate is represented [*Matangini v. Choomeymoney*, I. L. R. 22 Cal. 903].

Probate when
executor is
appointed for
limited
purpose.

548 When a person is appointed executor of a will for a particular purpose only of the will, and not executor of the will generally, probate will be granted to him limited for that purpose only.

Fresh grant,
when
allowed.

549 When a sole executor or a sole surviving executor to whom probate has been granted, or a sole administrator or a sole surviving administrator to whom a grant of administration has been made, dies leaving a

part of the deceased's property unadministered, then a fresh grant of administration may be made in respect of the property left unadministered, according to the rules hereinbefore prescribed for a first grant.

550 Errors in names and descriptions, or in setting forth the time and place of the deceased's death or the purpose in a limited grant, may be rectified by the court, and the grant of probate or letters of administration may be altered and amended accordingly.

Rectification
of errors in
grant.

551 Compensation shall be allowed to executors and administrators by way of commission as well on property not sold but retained by the heirs, as on property sold by such executors and administrators, at such rate not exceeding three per cent., and on cash found in the estate and on property specially bequeathed, at such rate not exceeding one and a half per cent. as the court shall, after taking into consideration the circumstances of each particular case with reference to the trouble incurred by such executors or administrators, determine. In no case shall a larger sum than five thousand rupees be allowed to any executor or administrator as such compensation, unless it shall be made apparent to the court that such unusual trouble has fallen upon him as to entitle him, in the opinion of the court, to receive further remuneration.

Compensation
of executors
and adminis-
trators.

552 Each executor or administrator shall be entitled to the full compensation allowed by law to a sole executor or administrator, unless there are more than three, in which case the compensation to which three would be entitled shall be apportioned among them all according to the services rendered by them respectively, and a like apportionment shall be made in all cases where there shall be more than one executor or administrator. But where the will provides a specific compensation for an executor or administrator, he shall not be

Compensa-
tion of
several
executors.

entitled to any allowance other than that so provided, unless he files in court a written renunciation of the specific compensation.

Filing of the account, and payment into court.

553 Every executor and administrator shall file in the district court on or before the expiration of twelve months from the date upon which probate or grant of administration issued to him, a true account of his executorship or administration, as the case may be, verified on oath or affirmation, with all receipts and vouchers attached, and may at the same time pay into court any money which may have come to his hands in the course of his administration to which any minor or minors may be entitled.

Failure of executor or administrator to administer within the year to make him liable for interest.

554 If any executor or administrator shall fail to pay over to the creditors, heirs, legatees, or other persons the sums of money to which they are respectively entitled, within one year after probate or administration granted, such executor or administrator shall be liable to pay interest out of his own funds for all sums which he shall retain in his own hands after that period, unless he can show good and sufficient cause for such detention.

An administrator has the right, until the estate is closed, to retain in his hands the funds of the estate for the purposes of administration. An order upon him to pay money in his hands into court is not justified, unless it is shown to be necessary for the protection of creditors or heirs in consequence of the misconduct or default of the administrator [*In re the Estate of Dharma Gunewardene*, 2 C. L. R. 9].

Chapter 39.

Actions in Lunacy.

The main provisions of this chapter are apparently borrowed from the Indian Act, No. 35 of 1858.

Definition of "lunatic."

555 The word "lunatic" as used in this Ordinance shall, unless the contrary appears from the context, mean every person found by due course of law to be of unsound mind and incapable of managing his affairs.

556 Whenever any person who is possessed of property is alleged to be a lunatic, the district court within whose jurisdiction such person is residing may, upon such application as is hereinafter mentioned, institute any inquiry for the purpose of ascertaining whether such person is or is not of unsound mind and incapable of managing his affairs.

District court
to institute
inquiry.

Application for such inquiry may be made on petition in the way of summary procedure by any relative of the alleged lunatic, or by the provincial superintendent of police, or at the instance of the Attorney-General, or, if the property of the alleged lunatic consists in whole or in part of land or of any interest in land, by the government agent or assistant government agent of the district in which it is situate.

Application
for, how to be
made.

557 When the district court on such application being made to it is not satisfied by affidavit or other evidence that such inquiry as aforesaid ought to be instituted, it shall dismiss the petition.

May be
dismissed,

558 When the district court on any such application being made to it is satisfied by affidavit or other sufficient evidence that such inquiry as aforesaid ought to be instituted, it shall pass an order to that effect and then appoint a time and place for holding the inquiry.

or proceeded
with.

559 As soon as such order shall have been passed, the district court shall cause a copy of the petition and of the order made thereon to be served upon the alleged lunatic. If it shall appear that the alleged lunatic is in such a state that personal service on him would be ineffectual, the court may direct such substituted service of the petition and order as it shall think proper. The court may also direct a copy of such petition and order to be served upon any specified relative of the alleged lunatic.

Proceeding in
such case.

Alleged
lunatic may
be required
to attend.

560 The district court may also at any time before or pending the inquiry require the alleged lunatic to attend at such convenient time and place as it may appoint, for the purpose of being personally examined by the court or by any person from whom the court may desire to have a report of, or testimony as to, the mental capacity and condition of such alleged lunatic. The court may likewise make an order authorising any person or persons therein named to have access to the alleged lunatic for the purpose of a personal examination.

Assessors.

561 The district court, if it think fit, may appoint two or more persons to act as assessors to the court in the said inquiry.

Issue.

562 The issue to be tried on such inquiry shall be, whether the alleged lunatic is or is not of unsound mind and incapable of managing his affairs.

Trial of : to be
public.

563 The trial of this issue shall be effected by *vivâ voce* examination and cross-examination of witnesses, as nearly as may be as is hereinbefore directed for the trial of the matter of an ordinary civil action ; and the inquiry, whether held in court or in a private house, shall be public.

Lunatic to be
present.

564 The alleged lunatic shall be present at the inquiry and shall take part as a party defendant therein either by his proctor or counsel or in person, unless his state of health, or his behaviour, is such as to render either his being present or his participating in the proceedings unfitting or unseemly.

Any relative of the alleged lunatic may also, if the court thinks fit, appear and take part in the inquiry on behalf of the alleged lunatic.

Adjudication
on the issue.

565 Upon the completion of the inquiry, the court shall adjudicate whether the alleged lunatic is or is not of unsound mind and incapable of managing his affairs. And at the same time the court may make such order as to the payment of the costs of the inquiry by the

person upon whose application it was made, or by the alleged lunatic, if he be adjudged to be of sound mind, or out of his estate, if he be adjudged of unsound mind and incapable of managing his affairs, or otherwise, as it may think proper. Costs.

566 When a person has been adjudged not to be of unsound mind and not incapable of managing his affairs, the court shall dismiss the petition. When
petition to
be dismissed.

567 When a person has been adjudged to be of unsound mind and incapable of managing his affairs, the district court shall appoint a manager of the estate. Any near relative of the lunatic or any other suitable person may be appointed manager. Manager to
be appointed.

568 Whenever a manager of the estate of a lunatic is appointed by the district court, the court shall appoint a fit person to be guardian of the person of the lunatic. The manager may be appointed guardian; provided always that the heir-at-law of the lunatic shall not in any case be appointed guardian of his person. Guardian of
person.

569 If the person appointed to be manager of the estate of a lunatic, or the person appointed to be guardian of a lunatic's person, shall be unwilling to discharge the trust gratuitously, the court may fix such allowance or allowances to be paid out of the estate of the lunatic as, under the circumstances of the case, may be thought suitable. Payment to.

570 The person appointed to be guardian of a lunatic's person shall have the care of his person and maintenance. When a distinct guardian is appointed, the manager shall pay to the guardian such allowance as shall be fixed by the court, either at the time when the guardian is appointed or afterwards, on an application made by such guardian by petition in the way of summary procedure, for the maintenance of the lunatic and of his family. Duties of.

Powers of.

571 Every manager of the estate of a lunatic appointed as aforesaid may exercise the same powers in the management of the estate as might have been exercised by the proprietor if not a lunatic; and may collect and pay all just claims, debts, and liabilities due to or by the estate of the lunatic. But no such manager shall have power to sell or mortgage the estate or any part thereof, or to grant a lease of any immovable property for any period exceeding five years, without an order of the district court previously obtained.

Restriction.

Inventory.

572 Every person appointed by the district court to be manager of the estate of a lunatic shall, within a time to be fixed by the court, deliver in court an inventory of the immovable property belonging to the lunatic, and of all such movable property, sums of money, goods, and effects as he shall receive on account of the estate, together with a statement of all debts due by or to the same. And every such manager shall furnish to the court annually, within three months of the close of the year, an account of the property in his charge, exhibiting the sums received and disbursed on account of the estate and the balance remaining in his hands. If any relative of the lunatic, or the Attorney-General, by petition to the court, shall impugn the accuracy of the said inventory and statement, or of any annual account, the court may summon the manager and inquire summarily into the matter and make such order thereon as it shall think proper.

Account.

Excess over
expenditure,
to be paid
into
kachcheri.

573 All sums received by a manager on account of any estate in excess of what may be required for the current expenses of the lunatic or of the estate shall be paid into the kachcheri on account of the estate, and shall be dealt with thereafter in such manner as is prescribed by law in the case of suitors' deposits.

574 It shall be lawful for any relative of a lunatic to sue for an account from any manager appointed under this Ordinance, or from such person after his removal from office or trust, or from his personal representative in case of his death, in respect of any estate then or formerly under his care or management, or of any sums of money or other property received by him on account of such estate.

Relative may
sue for
account.

575 The district court, for any sufficient cause, may on the application of the guardian or of a relative of the lunatic or of the Attorney-General, provincial superintendent of police, or (where the property of the lunatic consists in whole or in part of land, or of any interest in land) of the government agent or assistant government agent, made by petition in the way of summary procedure, remove any manager appointed by the court, and may appoint any other fit person in his room, and may compel the person so removed to make over the property in his hands to his successor, and to account to such successor for all moneys received or disbursed by him. The court may also, for any sufficient cause, in like manner remove any guardian appointed by the court.

Manager or
guardian
how to be
removed.

576 The district court may on any application made to it by a relative of the lunatic or a public officer under section 575 impose a fine not exceeding five hundred rupees on any manager of the estate of a lunatic who wilfully neglects or refuses to deliver his accounts or any property in his hands within the prescribed time or a time fixed by the court, and may realise such fine by attachment and sale of his property under the rules in force for the execution of decrees of court, and may also commit him to close custody until he shall deliver such accounts or property.

Punishment
for neglect or
refusal to
account.

Where not
necessary,
court need
not appoint
manager.

577 If it appears to the district court, having regard to the situation and condition in life of the lunatic and his family, and the amount and description of his property, to be unnecessary to appoint a manager of the estate as hereinbefore provided, the court may, instead of appointing such manager, order that the property if money, or if of any other description the proceeds thereof, when realised in such manner as the court shall direct, be paid to such persons as the court may think fit, to be applied for the maintenance of the lunatic and his family.

Further
inquiry when
lunatic so
found is
alleged to
have
recovered.

578 When any person has been adjudged to be of unsound mind and incapable of managing his affairs, if such person or any other person acting on his behalf, or having or claiming any interest in respect of his estate, shall represent by petition to the district court, or if the court shall be informed in any other manner, that the unsoundness of mind of such person has ceased, the court may institute an inquiry for the purpose of ascertaining whether such person is or is not still of unsound mind and incapable of managing his affairs. The inquiry shall be conducted in the manner provided in section 560 and the four following sections of this Ordinance; and if it be adjudged that such person has ceased to be of unsound mind and incapable of managing his affairs, the court shall make an order for his estate to be delivered over to him, and such order shall be final.

Supersession
of Lunacy
Ordinance.

579 In all cases in which this chapter is applicable, the procedure herein provided shall be followed, anything in Ordinance No. 1 of 1873 to the contrary notwithstanding.

Appeal to
Supreme
Court.

580 Every order made by a district court under the provisions of this chapter shall be subject to an appeal to the Supreme Court, and such appeal may be prosecuted by, or at the instance of, the person suspected or adjudged to be of unsound mind, or of any

relative or friend of his or of any medical practitioner who shall have certified or testified to his state of mind ; and the Supreme Court shall take cognizance of such appeal, and deal with the same as an appeal from an interlocutory order of the district court, and make such order thereon as to the said court shall seem fit. And it shall be the duty of the district court to conform to and execute such order.

581 No stamp duty shall attach or be payable for any application, process, or other document filed in court under the provisions of this chapter. Nor shall it be necessary to attach schedules to processes issued to the fiscal under such provisions.

Proceedings exempt from stamp and schedule duty.

Proceedings under this chapter, with the exception of those for which duties are specially prescribed by "The Stamp Ordinance, 1890," are not liable to stamp duty [*In re the Guardianship of Richard & James Henry*, 1 S. C. R. 15 ; 2 C. L. R. 2].

Actions for the Appointment of Guardians.

Chapter 40.

The principal provisions of this chapter are apparently borrowed from the Indian Act, No. 40 of 1858.

582 Every person who shall claim a right to have charge of property in trust for a minor, under a will or deed, or by reason of nearness of kin, or otherwise, may apply to the district court for a certificate of curatorship ; and no person shall be entitled to institute or defend any action connected with the estate of a minor, of which he claims the charge, until he shall have obtained such certificate. Provided that when the property is below the value of one thousand rupees, or for any other sufficient reason, any court having jurisdiction may allow any relative of a minor to institute or defend an action on his behalf, although a certificate of curatorship has not been granted to such relative. And provided further that any such person so claiming to have charge of any such property under the provisions of a will of which probate shall have been duly

Certificate of right to have charge of minor's property.

granted, may institute or defend any such action without having obtained such certificate.

Explanation.—A person to whom letters of administration of a deceased person's estate have been granted under chapter XXXVIII. of this Ordinance does not thereby obtain a right to have charge, within the meaning of this section, of such portion or share of his deceased's estate, if any there be, as descends to a minor heir.

Under this section one curator may be appointed and one certificate issued to him in respect of several minors. A curator under this section cannot institute an action on behalf of a minor. If he desires to do so, he must get himself appointed "next friend" under section 481 [*Fernando v. Weeresinghe*, 3 C. L. R. 67].

A certificate of curatorship is necessary only for actions instituted or defended by a curator in his own name *qua* curator, and is not necessary for actions instituted or defended by a minor by his next friend or guardian *ad litem* [*Uduma Lebte v. Seyedu Ali*, 1 N. L. R. 17].

In regard to the proviso of this section, when application is made for the appointment of next friend or guardian, it is not necessary to inquire into the value of the minor's property. Such inquiry is necessary only when it is sought to appoint a curator generally, or for the limited purpose contemplated by this section [*ibid*]. If a next friend claims charge of a minor's property of the value of Rs. 1,000 or over for any of the reasons stated in this section, he cannot institute an action with reference to that property, unless he first takes out a certificate of curatorship [*ibid*].

A District Court has no jurisdiction to appoint a curator of the estate of a minor who is not domiciled in this Colony or resident within it [*In the Matter of Mary Fernando, a minor*, 2 N. L. R. 249].

Application
for
appointment
of person to
have charge
of property
or person of
minor.

583 Any relative or friend of a minor, in respect of whose property such certificate has not been granted, may apply by petition in the way of summary procedure to the district court, to appoint a fit person to take charge of the property and person or of either property or person of such minor.

To be made
in district
where minor
resides.

584 If the property is situate in more than one district, any such application as aforesaid shall be made to the district court of the district in which the minor at the time of the application resides.

585 If it shall appear that any person claiming a right to have charge of the property of a minor is entitled to such right by virtue of a will or deed, and is willing to undertake the trust, the court shall grant a certificate of curatorship to such person. If there is no person so entitled, or if such person is unwilling to undertake the trust, and there is any near relative of the minor who is willing and fit to be entrusted with the charge of his property, the court may grant a certificate to such relative.

Charge of property of minor to whom to be granted.

The court may also, if it think fit (unless a guardian has been appointed by the father), appoint such person as aforesaid or such relative, or any other relative or friend of the minor, to be guardian of the person of the minor.

Same person may be appointed guardian of person.

The court may call upon any headman for a report on the character and qualification of any relative or friend of the minor who may be desirous or willing to be entrusted with the charge of the property or person of such minor, and who resides in the division.

Court may call upon headman to report on qualification.

A certificate of guardianship is not evidence of minority when the question of minority is in issue [*Gmyra v. Ablakh*, I. L. R. 18 Alla. 478].

The executor of a deceased person is not, as of right, entitled to curatorship under this section. In failure of a person absolutely entitled to curatorship under a will or deed, the court may appoint any person whom it considers fit for the purpose [*In re the Last Will of Abeywardene*, 1 S. C. R. 68 ; 2 C. L. R 19].

586 If no title to a certificate is established to the satisfaction of the court by a person claiming under a will or deed, and if there is no near relative willing and fit to be entrusted with the charge of the property of the minor, and the court shall think it necessary for the interest of the minor that provision should be made by the court for the charge of the property and person of such minor, the court may grant a certificate to any fit person whom the court may appoint for the purpose,

When charge of property may be granted to any fit person.

Guardian to
have charge
of the person
and
maintenance
to be
appointed at
the same
time :

his allowance.

587 Whenever the court shall grant a certificate of curatorship to the estate of a minor to any person under the last section, it shall at the same time appoint a guardian to take charge of the person and maintenance of the minor. The person to whom a certificate of curatorship has been granted may be appointed guardian, provided he would not be the legal heir of the minor, if the minor then died. If the person appointed to be guardian be unwilling to discharge the trust gratuitously, the court may assign him such allowance, to be paid out of the estate of the minor, as under the circumstances of the case it may think suitable. The court may also fix such allowance as it may think proper for the maintenance and education of the minor; and such allowance and the allowance of the guardian (if any) shall be paid to the guardian by the other person as aforesaid. In any case in which the court is satisfied that it will be for the interest of the minor, it may direct the raising of such allowance out of the *corpus* of the estate, by mortgage or sale or such other mode of realisation as it thinks fit.

The Code does not limit the powers conferred on guardians by the Roman-Dutch Law. A guardian may sell immovable property with the sanction of the court. Such sale should be by public auction with a reserve price put upon the property by the court, which should also give directions as to the manner of sale and of the investment of the proceeds thereof [*In the Matter of Abraham and Elias de Mel, minors*, 1 N. L. R. 140].

A mother married in community and surviving her husband has a preferential right to be appointed as a guardian of her children, but some other person should be named by the court to act with her, so as to safeguard the interests of the children [*ibid*].

Costs of
inquiries.

588 In all inquiries held by the district court under this chapter the court may make such order as to the payment of costs by the person on whose application the inquiry was made, or out of the estate of the minor, or otherwise, as it may think proper.

Every curator other than one deriving title under a will or deed, to whom a certificate shall have been granted under this chapter, shall, within a time to be fixed by the court, file in court an inventory of the property belonging to the minor, and shall also twice every year, namely, within one month from January 1 and July 1, respectively, in each year, file an account of the property in his charge, exhibiting the amounts received and disbursed on account of the estate and the balance in hand.

Inventory.

Accounts.

589 Any relative of the minor or the minor himself by a next friend or the Attorney-General may, by petition and by way of summary procedure, impeach and falsify the correctness of the said inventory and periodic accounts, or complain of delay in the filing of them; and the court may on any such application make such order as it shall think proper.

Impeachment of the inventory and accounts.

590 It shall be lawful for any relative of a minor, with the leave of the court, or the minor himself by a next friend, at any time during the continuance of the minority, to sue for an account from any person to whom a certificate shall have been granted under the provisions of this Ordinance, or from any such person, after his removal from office or trust, or from his personal representative in case of his death, in respect of any estate then or formerly under his care or management, or of any sums of money or other property received by him on account of such estate.

Any relative of minor may sue curator for accounts.

591 The district court, for any sufficient cause shown on petition by way of summary procedure preferred by the guardian, or by a relative, or by a next friend of the minor, or by the Attorney-General, may recall any certificate granted under this chapter and may grant a certificate to any other person; and may compel the person whose certificate has been recalled

Recall of the certificate.

to make over the property in his hands to his successor, and to account to such successor for all moneys received and disbursed by him. The court may also for sufficient cause in like manner remove any guardian appointed by the court.

The petition under this section is not liable to stamp duty [*In re the Guardianship of Richard and James Henry*, 1 S. C. R. 15].

Resignation
and discharge
of curator of
property or
guardian of
person of
minor.

592 The district court may permit any person to whom a certificate shall have been granted under this Ordinance, and any guardian appointed by the court, to resign his trust; and may give him a discharge therefrom on his accounting to his successor, duly appointed, for all moneys received and disbursed by him, and making over the property in his hands.

The application to be discharged from the trust shall be made by petition in the way of summary procedure, in which petition a near relative of the minor or the Attorney-General shall be named a respondent; and it shall be competent to the court to direct that any other person be made a respondent.

Allowance of
curator.

593 Every curator other than one deriving title under a will or deed, to whom a certificate shall have been granted under this chapter, if he is not willing to discharge the trust gratuitously, shall be entitled to receive such allowance, to be paid out of the minor's estate, as the district court shall by order, made when the curator is appointed or afterwards on an application made by the curator by petition in the way of summary procedure, think fit to direct.

Minor's
education.

594 Every guardian appointed by the district court under this chapter, who shall have charge of any minor, shall be bound to provide for his education in a suitable manner. The general superintendence and control of the education of all such minors shall be vested in the district court.

Actions for Appointment and Removal of Trustees. Chapter 41.

595 Applications to the district court for the exercise of its jurisdiction for the appointment or removal of a trustee, and not asking any further remedy or relief, may be made by petition in the way of the summary procedure hereinbefore prescribed.

Matrimonial Actions.

Chapter 42.

596 In all actions for divorce *à vinculo matrimonii*, or for separation *à mensâ et thoro*, or for declaration of nullity of marriage, the pleadings shall be by way of plaint and answer, and such plaint and answer shall be subject to the rules and practice by this Ordinance provided with respect to plaints and answers in ordinary civil actions, so far as the same can be made applicable, and the procedure generally in such matrimonial cases shall (subject to the provisions contained in this chapter) follow the procedure hereinbefore set out with respect to ordinary civil actions.

Procedure in matrimonial actions.

597 Any husband or wife may present a plaint to the district court within the local limits of the jurisdiction of which he or she, as the case may be, resides, praying that his or her marriage may be dissolved on any ground for which marriage may, by the law applicable in this colony to his or her case, be dissolved.

Court of district in which petitioner resides to have jurisdiction.

Courts of Ceylon have no jurisdiction to decree a divorce *à vinculo matrimonii* between parties who are domiciled, and who were married, elsewhere than in Ceylon [*Le Mesurier v. Le Mesurier & Wood*, 3 S. C. R. 12].

This section does not empower a District Court to entertain any divorce suit which was not previously cognizable by the courts of the Island [*Le Mesurier v. Le Mesurier*, 1 N. L. R. 160].

598 Upon any such plaint presented by a husband, in which the adultery of the wife is the cause or part of the cause of action, the plaintiff shall make the alleged adulterer a co-defendant to the said action, unless he is excused from so doing on one of the

Co-defendant.

following grounds, to be allowed by the court upon an application for the purpose :

- (1) That the defendant is leading the life of a prostitute, and that the plaintiff knows of no person with whom the adultery has been committed ;
- (2) That the name of the alleged adulterer is unknown to the plaintiff, although he has made due efforts to discover it ;
- (3) That the alleged adulterer is dead ;

and it shall be lawful in any such plaint to include a claim for pecuniary damages against such co-defendant.

“ Unless he is excused,” &c.—The excuse can only be obtained by regular prayer to the court upon an affidavit or other sufficient evidence, and it must be embodied in the plaint. Merely inserting in the plaint the name of the alleged adulterer as a co-defendant, no process being served upon him, and no steps being taken to bring him into the action, is not sufficient compliance with the requirements of this section [*Ziegan v. Ziegan*, 1 S. C. R. 3].

Affidavit
where
co-defendant
is excused.

599 The prayer to be excused from making the alleged adulterer a co-defendant, and the allegations of fact upon which it is founded, supported by affidavit of fact or other sufficient evidence, shall be embodied in the plaint.

Connivance,
condonation,
counter-
charge.

600 Upon the trial had upon the footing of any such plaint for the dissolution of a marriage, the court shall satisfy itself, not only as to the facts alleged, but also whether or not the plaintiff has been in any manner accessory to or conniving at the act or conduct which constitutes the ground upon which the dissolution of marriage is prayed for in the plaint, or has condoned the same, and shall also inquire into any counter-charge which may be made by the defendant or co-defendant against the plaintiff.

601 In case the court, on the evidence in relation to any such complaint, is not satisfied that the plaintiff's case has been proved, or finds that the plaintiff has, during the marriage, been accessory to or conniving at the act or conduct which constitutes the ground upon which the dissolution of marriage is prayed for, or has condoned the same, or that the complaint is presented or prosecuted in collusion with either of the defendants, then and in any of the said cases the court shall dismiss the complaint.

Plaint, when
to be
dismissed.

602 In case the court is satisfied on the evidence that the case of the plaintiff has been proved, and does not find that the plaintiff has been in any manner accessory to or conniving at the act or conduct which constitutes the ground upon which the dissolution of marriage is prayed for, or has condoned the same, or that the complaint is presented or prosecuted in collusion with either of the defendants, the court shall pronounce a decree declaring such marriage to be dissolved in the manner and subject to all the provisions and limitations in sections 604 and 605 hereinafter made and declared.

Otherwise
decree to be
passed.

Provided that the court shall not be bound to pronounce such decree if it finds that the plaintiff has, during the marriage, been guilty of adultery, or if the plaintiff has, in the opinion of the court, been guilty of unreasonable delay in presenting or prosecuting such complaint, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct of or towards the other party as has conduced to the adultery.

Proviso.

No adultery shall be deemed to have been condoned within the meaning of this chapter unless where conjugal cohabitation has been resumed or continued.

Defendant
when entitled
to relief.

603 In any action instituted for dissolution of marriage, if the defendant opposes the relief sought on any ground which would have enabled him or her to sue as plaintiff for such dissolution, the court may in such action give to the defendant on his or her application the same relief to which he or she would have been entitled in case he or she had presented a plaint seeking such relief.

Decree to be
decree *nisi*.

604 Every decree for dissolution of marriage shall, in the first instance, be a decree *nisi*, not to be made absolute till after the expiration of not less than three months from the pronouncing thereof, or such longer period as the Supreme Court by general or special order from time to time directs.

During that period any person shall be at liberty, in such manner as the Supreme Court by general or special order from time to time directs, and in the absence of any such order, by petition on summary procedure to which the plaintiff and the defendants shall, if reasonably possible, be made respondents, to show cause against the said decree being made absolute by reason of the same having been obtained by collusion or by reason of material facts not having been brought before the court. On cause being so shown, the court shall deal with the case by reversing the decree *nisi*, or by requiring further inquiry, or otherwise as justice may demand.

Costs.

The court may order the costs of counsel and witnesses, and otherwise arising from such cause being shown, to be paid by the parties or such one or more of them as it thinks fit, including a wife if she have separate property.

A decree *nisi* under this section is a decree from which an appeal lies [*Ziegan v. Ziegan*, 1 S. C. C. 3].

Decree when
to be made
absolute.

605 Whenever a decree *nisi* has been made and no sufficient cause has been shown why the same should not be made absolute as in the last preceding section

provided within the time therein limited, such decree *nisi* shall on the expiration of such time be made absolute.

606 During the progress of the action, any person suspecting that any parties to the action are or have been acting in collusion for the purpose of obtaining a divorce shall be at liberty, in such manner as the Supreme Court by general or special order from time to time directs, and in the absence of any such order, by petition on summary procedure supported by affidavit of fact or other sufficient evidence, to apply to the district judge to take such steps in respect of the alleged collusion as may be necessary to enable him to make a decree in accordance with the justice of the case.

Procedure on suspicion of collusion during progress of action in district court.

607 Any husband or wife may present a plaint to the district court within the local limits of the jurisdiction of which he or she (as the case may be) resides, praying that his or her marriage may be declared null and void.

Actions of nullity of marriage.

Such decree may be made on any ground which renders the marriage contract between the parties void by the law applicable to this colony.

608 Application for a separation *à mensâ et thoro* on any ground on which by the law applicable to this Colony such separation may be granted, may be made by either husband or wife by plaint to the district court, within the local limits of the jurisdiction of which he or she, as the case may be, resides, and the court, on being satisfied on due trial of the truth of the statements made in such plaint, and that there is no legal ground why the application should not be granted, may decree separation accordingly.

Court of district in which applicant resides to have jurisdiction.

609 In every case of such separation under this chapter the wife shall, from the date of the sentence, and whilst the separation continues, be considered as

Separated wife's property.

unmarried with respect to property of every description which she may acquire, or which may come to or devolve upon her.

Such property may be disposed of by her in all respects as an unmarried woman, and on her decease the same shall, in case she dies intestate, devolve as the same would have devolved if she had died unmarried.

Proviso.

Provided that if any such wife again cohabits with her husband, all such property as she may be entitled to when such cohabitation takes place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate.

Separated
wife's
contracts and
rights to sue.

610 In every case of such separation under this chapter the wife shall, whilst so separated, be considered as an unmarried woman for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceedings; and her husband shall not be liable in respect of any contract, act, or costs entered into, done, omitted, or incurred by her during the separation.

Proviso 1.

Provided that where, upon any such separation, alimony has been decreed or ordered to be paid to the wife, and the same is not duly paid by the husband, he shall be liable for necessities supplied for her use to the persons who supplied them.

Proviso 2.

Provided also that nothing shall prevent the wife from joining, at any time during such separation, in the exercise of any joint power given to herself and her husband.

When decree
for separation
may be
reversed by
the court
which made
it.

611 Any husband or wife, upon the application of whose wife or husband, as the case may be, a decree of separation has been pronounced, may, at any time thereafter, present a petition to the court by which the decree was pronounced, praying for a reversal of such decree, on the ground that it was obtained in his or her

absence at the hearing, and that there was reasonable excuse for such absence, and also for the alleged desertion, where desertion was the ground of such decree.

Such petition shall be deemed and shall be dealt with by the court as a plaint in a regular action, and the party in whose favour the decree of separation sought to be reversed was passed shall be made a defendant therein. And the court may, after trial in regular course of procedure, on being satisfied of the truth of the allegations of such petition, reverse the decree accordingly, but such reversal shall not prejudice or affect the rights or remedies which any other person would have had in case it had not been decreed, in respect of any debts, contracts, or acts of the wife incurred, entered into, or done between the time of the sentence of separation and of the reversal thereof.

612 Whenever in any plaint presented by a husband the alleged adulterer has been made a co-defendant, and the adultery has been established, the court may order the co-defendant to pay the whole or any part of the costs of the proceedings in addition to any damages which may be awarded, where such damages have been claimed.

Co-defendant
may be
ordered to
pay costs.

Provided that the co-defendant shall not be ordered to pay the plaintiff's costs, nor shall any damages be awarded—

- (1) If the defendant was at the time of the adultery living apart from her husband and leading the life of a prostitute ; or
- (2) If the co-defendant had not at the time of the adultery reason to believe the defendant to be a married woman.

613 Whenever any application is made under section 606, the court if it thinks that the applicant had no grounds, or no sufficient grounds for intervening, may order him to pay the whole or any part of the costs occasioned by the application.

Intervient
under section
606 may be
ordered to
pay costs.

Alimony
pendente lite.

614 In any action under this chapter, whether it be instituted by a husband or a wife, the wife may present a petition for alimony pending the action. Such petition shall be preferred and dealt with as of summary procedure, and the husband shall be made respondent therein; and the court, on being satisfied of the truth of the statements therein contained, may make such order on the husband for payment to the wife of alimony pending the action as it may deem just.

Proviso.

Provided that alimony pending the action shall in no case be less than one-fifth of the husband's average nett income for the three years next preceding the date of the order, and shall continue, in case of a decree for dissolution of marriage or of nullity of marriage, until the decree is made absolute or is confirmed, as the case may be.

Permanent
alimony.

615 The court may, if it thinks fit, on any decree absolute declaring a marriage to be dissolved, or on any decree of separation obtained by the wife, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it thinks reasonable; and for that purpose may cause a proper instrument to be executed by all necessary parties.

Proviso.

In every such case the court may make an order on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support, as the court may think reasonable. Provided that if the husband afterwards from any cause becomes unable to make such payments, it shall be lawful for the court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again

to revive the same order wholly or in part, as to the court seems fit.

616 In all cases in which the court makes any decree or order for alimony, it may direct the same to be paid either to the wife herself, or to any trustee on her behalf to be approved by the court, and may impose any terms or restrictions which to the court seem expedient, and may from time to time appoint a new trustee if it appears to the court expedient so to do.

Form of
decree for
alimony.

A decree for alimony must express on the face of it the sums which and the periods at which the defendant is required to pay the rate fixed by the court [*Le Mesurier v. Le Mesurier*, 1 S. C. R. 287].

617 Whenever the court pronounces a decree of dissolution of marriage for adultery of the wife, if it is made to appear to the court that the wife is entitled to any property, the court may, if it thinks fit, order such settlement as it thinks reasonable to be made of such property or any part thereof, for the benefit of the husband, or of the children of the marriage, or of both.

Court may
order
settlement of
property ;

Any instrument executed pursuant to any order of the court at the time of or after the pronouncing of a decree of dissolution of marriage, or separation, shall be deemed valid notwithstanding the existence of the disability of coverture at the time of the execution thereof.

618 The court, after a decree absolute for dissolution of marriage or a decree of nullity of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders, with reference to the application of the whole or a portion of the property settled, whether for the benefit of the husband or the wife, or of the children (if any) of the marriage, or of both children and parents, as to the court seems fit. Provided that the court shall not make

and inquire
into ante-
and post-
nuptial
settlements.

Proviso.

any order for the benefit of the parents or either of them at the expense of the children.

Court may
order
maintenance
of children
pending
action :

619 In any action for obtaining a separation, the court may from time to time, before making its decree, make such interim orders, and may make such provision in the decree, as it deems proper with respect to the custody, maintenance, and education of the minor children, the marriage of whose parents is the subject of such action, and may, if it thinks fit, direct proceedings to be taken for placing such children under the protection of the said court.

and after
decree of
judicial
separation ;

620 The court after a decree of separation may, upon application by way of summary procedure for this purpose, make from time to time all such orders and provisions, with respect to the custody, maintenance, and education of the minor children, the marriage of whose parents is the subject of the decree, or for placing such children under the protection of the said court, as might have been made by such decree or by interim orders in case the proceedings for obtaining such decree were still pending.

and pending
an action for
dissolution ;

621 In any action for obtaining a dissolution of marriage or a decree of nullity of marriage, the court may from time to time, before making its decree absolute or its decree (as the case may be), make such interim orders, and may make such provision in the decree absolute or decree, as the court deems proper with respect to the custody, maintenance, and education of the minor children, the marriage of whose parents is the subject of the action, and may, if it thinks fit, direct proceedings to be taken for placing such children under the protection of the court.

and after
decree
absolute
therein.

622 The court after a decree absolute for dissolution of marriage or a decree of nullity of marriage, may, upon application by petition on summary procedure

for the purpose, make from time to time all such orders and provisions, with respect to the custody, maintenance, and education of the minor children, the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the said court as might have been made by such decree absolute or decree (as the case may be), or by such interim orders as aforesaid.

623 The court may from time to time adjourn the hearing of any petition or plaint under this chapter, and may of its own motion require further evidence thereon if it sees fit so to do.

Adjournment
and further
evidence.

624 All decrees and orders made by the court in any action or proceeding under this chapter shall be enforced, and may be appealed from, in the like manner as the decrees and orders of the court made in the exercise of its original civil jurisdiction are enforced, and may be appealed from under the laws, rules, and orders for the time being in force.

Appeal.

625 Upon a decree *nisi* for divorce being made absolute under the provisions of this chapter, or when three months after the passing of a decree thereunder of nullity of marriage shall have elapsed, without an appeal having been taken therefrom, upon the confirmation in appeal of any such decree, but not sooner, it shall be lawful for the respective parties to the marriage to marry again as if the prior marriage had been dissolved by death.

When parties
may marry
again.

Provided that no appeal to Her Majesty in Council has been presented against any such order or decree.

Proviso.

In the event of such an appeal having been presented, then when it has been dismissed, or when in the result thereof the marriage is required to be dissolved, but not sooner, it shall be lawful for the respective parties to the marriage to marry again, as if the prior marriage had been dissolved by death.

Protection of
third parties
dealing with
wife after
decree made
and before
reversal.

626 Every decree for separation or order to protect property obtained by a wife under this chapter shall, until reversed or discharged, be deemed valid, so far as necessary for the protection of any person dealing with the wife.

No reversal, discharge, or variation of such decree or order shall affect any rights or remedies which any person would otherwise have had in respect of any contracts or acts of the wife entered into or done between the dates of such decree or order and of the reversal, discharge, or variation thereof.

All persons who, in reliance on any such decree or order, make any payment to, or permit any transfer to be made, or act to be done by the wife who shall have obtained such decree or order, shall (notwithstanding the same may then have been reversed, discharged, or varied, or notwithstanding the separation of the wife from her husband may have ceased or may at some time since the making of the decree or order have been discontinued) be protected and indemnified as if at the time of such payment, transfer, or other act such decree or order were valid and still subsisting without variation, and the separation had not ceased or been discontinued, unless at the time of the payment, transfer, or other act such persons had notice of the reversal, discharge, or variation of the decree or order or of the cessation or discontinuance of the separation.

Saving of the
application
of this
Ordinance as
to certain
marriages.

627 Nothing in this chapter contained shall be taken to apply to any marriage between persons professing the Mohammedan faith or to any marriage affected by the provisions of Ordinance No. 3 of 1870.

Chapter 43.

Interpleader Actions.

Interpleader
actions.

628 When two or more persons claim adversely to one another payment of the same sum of money or delivery of the same property from another person,

whose only interest therein is that of a mere stakeholder, and who is ready to render it to the right owner, such stakeholder may institute an action of interpleader against all the claimants, for the purpose of obtaining a decision as to the party to whom the payment should be made or the property delivered, and of obtaining indemnity for himself.

Provided that if any action is pending in which the rights of all parties can properly be decided, the stakeholder shall not institute an action of interpleader. Proviso.

See section 470 of the Indian Code.

A right of lien is not an interest in the property [*Attenborough v. St. Katherine's Dock Co.*, 3 C. P. D. 450].

629 In every action of interpleader the plaintiff must, in addition to the other statements necessary for complaints, state— Form of
plaint.

- (a) That the plaintiff has no interest in the thing claimed otherwise than as a mere stakeholder ;
- (b) The claims made by the defendants severally ; and
- (c) That there is no collusion between the plaintiff and any of the defendants ;

and such complaint shall also be supported by an affidavit of the plaintiff verifying the statements contained therein.

See section 471 of the Indian Code.

No suit will lie if the plaintiff claims an interest in the property [*Mitchell v. Hayne*, 2 S. & S. 63] or disputes the amount [*Heplock v. Hammond*, 2 Sm. & E. 141] ; or has handed over the property to one claimant as an indemnity [*Burnett v. Anderson*, 1 Mer. 405].

630 When the thing claimed is capable of being paid into court or placed in the custody of the court, the plaintiff must so pay or place it before he can be entitled to any order in the action. Property
claimed to be
deposited in
court.

Same as section 472 of the Indian Code.

Procedure at
the hearing.

631 At the hearing the court may—

- (a) Declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the action :

or if it thinks that justice or convenience so require—

- (b) Retain all parties until the final disposal of the action ;

and if it finds that the admissions of the parties or other evidence enable it to do so, may—

- (c) Adjudicate upon the title to the thing claimed ;
or else it may—

- (d) Direct the defendants to interplead one another by filing statements and entering into evidence for the purpose of bringing their respective claims before the court.

Same as section 473 of the Indian Code.

Who may not
be sued in
interpleader.

632 Nothing in this chapter shall be taken to enable agents to sue their principals, or tenants to sue their landlords, for the purpose of compelling them to interplead with any persons other than persons making claim through such principals or landlords.

Illustrations.

- (a) A deposits a box of jewels with B as his agent. C alleges that the jewels were wrongfully obtained from him by A, and claims them from B. B cannot institute an interpleader-action against A and C.
- (b) A deposits a box of jewels with B as his agent. He then writes to C for the purpose of making the jewels a security for a debt due from himself to C. A afterwards alleges that C's debt is satisfied, and C alleges the contrary. Both claim the jewels from B. B may institute an interpleader-action against A and C.

Same as section 474 of the Indian Code.

If a landlord has created a subsequent intermediate tenure, or the agent is not certain who his principal is, a suit will lie [*Clarke v. Byne*, 13 Ves. 383 ; *Stuart v. Welch*, 4 My. & C. 305].

633 When the action is properly instituted, the court may provide the plaintiff's costs by giving him a charge on the thing claimed, or in some other effectual way.

Of the plaintiff's costs therein.

Same as section 475 of the Indian Code.

634 If any of the defendants in an interpleader action is actually suing the stakeholder in respect of the subject of such action, the court in which the action against the stakeholder is pending shall, on being duly informed by the court which passed the decree in the interpleader action in favour of the stakeholder, that such decree has been passed, stay the proceedings as against him, and his costs in the action so stayed may be provided for in such action ; but if and so far as they are not provided for in that action, they may be added to his costs incurred in the interpleader action.

Procedure where stakeholder is sued by defendant.

Same as section 476 of the Indian Code.

Actions which fail for want of Jurisdiction.

Chapter 44.

635 When an action fails for want of jurisdiction in the court to entertain and determine the matter of the action on its merits, it shall, nevertheless, be competent to the court to make such order on the parties for the payment of costs as to it shall seem just; and every such order for the payment of costs is a decree for money within chapter XX.

Power to make order for costs notwithstanding want of jurisdiction.

Where two issues are framed, one on the question of jurisdiction and the other on the merits, and the first is decided in the plaintiff's favour, the court must proceed to try the other as well. The defendant should not appeal on the order as to jurisdiction but wait until final judgment, and then appeal if it be against him, not only on the merits, but also on the ruling as to jurisdiction [*Ibrahim v. Maricar*, 3 N. L. R. 166].

636 When the want of jurisdiction is caused by reason of the exclusive jurisdiction of any village tribunal, the averment in the plaint made in pursuance of section 45 shall be considered as traversed, whether

When want of jurisdiction caused by exclusive jurisdiction of any village

tribunal,
avermert of
jurisdiction
in plaint is
traversed.

the defendant in his answer is silent in reference to it or not; and it shall be the duty of the court to dismiss the action on this preliminary issue in bar at the earliest stage of the action whereat, by the admission of the parties or other evidence, it appears to the court that such village tribunal has exclusive jurisdiction.

Order of
dismissal, not
reversed on
appeal;
conclusive as
to jurisdiction
of other
court.

637 The order of court so dismissing the action shall adjudicate upon the facts which found the jurisdiction of such village tribunal; and if not appealed against, or if, in the event of an appeal, not reversed, this order shall be conclusive evidence of jurisdiction on the same claim being made before such village tribunal.

And
conversely.

638 Also the decision of a village tribunal declining jurisdiction shall be conclusive evidence against such jurisdiction in an action upon the same claim brought in any other court.

Chapter 45.

Actions relating to Public Charities.

Actions for
carrying into
effect trusts
for public
charity.

639 In case of any alleged breach of any express or constructive trust created for public charitable purposes, or whenever the direction of the court is deemed necessary for the administration of any such trust, the Attorney-General acting *ex officio*, or two or more persons having an interest in the trust, and having obtained the consent in writing of the Attorney-General, may institute an action in the court within the local limits of whose civil jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree—

- (a) Removing any trustee or trustees of the charity, and if necessary, appointing new trustees thereof;
- (b) Vesting any property in the trustees of the charity;

- (c) Declaring the proportions in which its objects are entitled;
 - (d) Authorising the whole or any part of its property to be let, sold, mortgaged, or exchanged;
 - (e) Settling a scheme for its management;
- or granting such further or other relief as the nature of the case may require.

This section is substantially the same as section 539 of the Indian Code.

A suit by one trustee of a public charity against another for breach of trust requires sanction [*Tricumdas v. Khimji*, I. L. R. 16 Bom. 626; but see *Augustine v. Medlycott*, I. L. R. 16 Mad. 241].

The Attorney-General's costs would come, as a rule, out of the trust fund [see *Parmanandas v. Venayek*, I. L. R. 7 Bom. 19].

Of Actions to realise Moneys due or secured upon Mortgages.

Chapter 46.

The procedure under this chapter is not applicable where the mortgagor has died before the Code came into operation [*Nagappen v. Adam Levvai*, 9 S. C. C. 197].

640 Every mortgagee or person entitled to bring any action for the realisation of moneys secured to him upon a mortgage shall sue the mortgagor as defendant, whether such mortgagor is or is not in possession of the property mortgaged at the time of action brought.

Mortgagor to be sued whether in possession or not.

641 In every such case where the mortgagor is dead, such mortgagee or person shall be entitled to sue the executor or administrator of such deceased mortgagor.

Where mortgagor dead, executor or administrator to be sued.

642 In every such case where no executor has been appointed or no administration has been taken out to the estate and effects of such deceased mortgagor, and the property mortgaged amounts to or exceeds in value one thousand rupees, it shall be obligatory on such mortgagee or person, before proceeding with his action, to apply to the court to appoint an administrator to the estate and effects of such deceased mortgagor under the provisions of chapter XXXVIII., and any

Where no executor or administrator, mortgagee to apply for the appointment of an administrator if mortgaged property exceeds one thousand rupees.

Where such property under one thousand rupees, person may be appointed to represent the estate without administration.

such administration may be limited or otherwise under the provisions of section 539. Provided that in every such case where the property mortgaged is under the value of one thousand rupees, the court may, on the application of such mortgagee or person, before action brought, and on its appearing to the court necessary or desirable, appoint some person to represent the estate of the deceased mortgagor for all the purposes of the action, on such notice to such persons (if any) as the court shall think fit; and the order so made and any order consequent thereon shall bind the estate of the deceased mortgagor in the same manner in all respects as if a duly constituted administrator of the deceased mortgagor had been a party to the action.

Upon the application to be made under this section it is not competent to the court to appoint the mortgagee himself administrator [*Nagappen v. Adam Leevai*, 9 S. C. C. 197].

Under the proviso to this section it is competent to the District Court, upon application made in respect of a mortgage of less value than Rs. 1,000, to appoint a person to represent the deceased mortgagor's estate for the purposes of the action intended to be raised for the recovery of the mortgage debt. The proviso stands independently of the testamentary chapters of the Code, and applies to a case of mortgage whether the death of the mortgagor took place before or after the commencement of the operation of the Code [*Soyya v. Alwis*, 1 N. L. R. 255].

A mortgage decree in an action against the representative under this section will estop him from questioning the right of the mortgagor to mortgage the lands decreed executable. If the representative who was the widow of the mortgagor was entitled to the land in her own right, she should not have assumed the representative character imposed on her. *Per* LAWRIE, J.—Under a decree in such an action no other land can be seized in execution than those named in the decree as executable [*Mohamado v. Unma Natchia*, 1 N. L. R. 346].

Where a deceased mortgagor has left an estate under Rs. 1,000 in value, the mortgagee may either bring a hypothecary action under this section against the mortgaged property only or may sue the mortgagor's heirs who have adiated the inheritance or are in possession of the estate in an action not merely hypothecary, but, if necessary, to obtain payment out of the rest of the intestate's assets [*Silva v. Fernando*, 3 N. L. R. 15].

643 On the issue of the summons in any action under this chapter, such mortgagee or person shall issue notice thereof in writing, to which a copy of the summons shall be annexed, to all grantees, mortgagees, lessees, and other incumbrancers whose deed of conveyance, mortgage, lease, or other incumbrance shall be of date subsequent to that of the mortgage on which such action is brought, and who shall have at any time previous to the bringing of such action notified to him in writing that they have duly registered their deeds, and shall have also furnished him with an address for the service of such notice, which shall be the same as the address furnished by them to the registrar of lands for the district in which the property is situate. Any notice mentioned in this section may be sent by post, and the production of a receipt for the registered cover under which any such notice was sent shall be sufficient proof that it was so sent. And every registrar of lands shall keep a separate book, in a form to be prescribed by the Registrar-General, in which addresses for the service of such notices shall be entered.

Notice to
puisne
incumbran-
cers.

644 Any person so noticed may on the day fixed in the summons for the defendant to appear and answer apply under the provisions of section 18 to be joined as a defendant in the action. Every person so noticed not so applying to be joined as defendant, and every such grantee, mortgagee, lessee, or other incumbrancer whose deed shall not have been registered or who shall not have furnished such address as aforesaid, shall be bound by the judgment in the action in all respects as fully as though he had been a party thereto. Provided always that the mortgage in respect of which such judgment shall be given shall have itself been duly registered, and such mortgagee or person shall have furnished an address to the registrar of lands and to every grantee, mortgagee, lessee, or other incumbrancer

Application
by puisne
incumbran-
cers to be
joined.

from whom he has received such notification as in the last preceding section mentioned. Provided, also, that the provisions of chapter XII. of this Ordinance with regard to the cure of default in appearance or pleading shall, so far as they can be made applicable thereto, apply to any case of intervention under this section.

Sequestration
may issue in
certain cases.

645 In cases of actions brought to obtain realisation of a mortgage or pledge, if the fiscal return to the precept for service of summons that the defendant is not to be found, and if the plaintiff shall, by his own statement, subject to punishment for contempt of court in case of his making a false statement, verify his demand to the satisfaction of the court, and further satisfy the court that, notwithstanding all reasonable effort on his part, the defendant cannot be found, a mandate of sequestration (form 98, schedule II.) shall, on the motion of the plaintiff, issue to the fiscal from the court, directing him to seize and sequester the houses, lands, goods, money, or other property which are the subject of the mortgage or pledge, and to detain or secure the same till the defendant shall appear or answer. And the fiscal shall cause due notice in writing to be served on all persons in whose possession or power such property of the defendant, whether movable or immovable, shall be, of the sequestration having issued, and requiring them to reserve and retain the same, and all issues, rents, profits, and interest accruing therefrom, to abide the further order of the court.

Under a writ of sequestration issued under this section the Fiscal has no right to seize goods in the *bonâ fide* possession of persons other than the defendant. In the case of such goods the Fiscal must simply give notice to the possessor of the sequestration having issued [*Ramen Chetty v. Campbell*, 2 N. L. R. 94].

Notice of
sequestration
to be
published.

646 The property so sequestered shall either remain under sequestration or be sold, at the discretion of the court, regard being had to the nature of such property

and the interests of all parties concerned. As soon as conveniently may be after such sequestration, written notices in English and the native language or languages of the district shall be affixed at the court-house and at such other public and conspicuous places, or shall be advertised in such public newspapers as the court shall direct, stating the names and designations of the parties, the cause of action, that such sequestration has issued, the description of the property sequestered, and calling on the defendant to appear. Proclamation shall also be made two several days in open court, at such intervals as the court in its discretion shall consider fit and just towards all parties, calling on the defendant to appear on pain of the court proceeding *ex parte*.

647 If the defendant shall appear on or before the day of the last proclamation, and shall give such security for the ultimate satisfaction of such decree as may be passed against him in the action as the court shall consider the nature of the case to require, the sequestration shall thereupon be dissolved, and the action shall proceed as in ordinary cases; and in default of his giving such security he shall be admitted to appear and defend such action, but the property shall remain under sequestration. If the defendant shall not appear on or before such day of last proclamation, the court shall, on motion of the plaintiff, proceed to hear the case *ex parte*.

Sequestration
how
dissolved.

648 If the property sequestered be claimed by a third party, the right thereto shall be tried between the claimant and the plaintiff as an incidental action; and the proceedings in the original action shall be stayed, if the court shall consider such stay necessary for the purposes of justice, but not otherwise.

Property
sequestered
claimed by
third party.

In the case of a claim under this section the only question to be decided by the court is whether the claimant is the owner of the property sequestered or not [*Ramen Chetty v. Campbell*, 2 N. L. R. 94].

Where
mortgagor
insolvent,
assignee to
be joined.

649 In every case where an action is brought against a mortgagor against whom proceedings in insolvency are in progress in any court in this colony, the assignee in insolvency shall be joined as a co-defendant.

PART 5.

PROVISIONAL REMEDIES.

Chapter 47.

Of Arrest and Sequestration before Judgment.

The provisions on this subject in the Indian Code commence at section 477. They are in many particulars different from the provisions of our Code.

Arrest before
judgment.

650 If a plaintiff or one of several plaintiffs in any action, either at the commencement thereof or at any subsequent period before judgment, shall, by way of motion on petition, supported by his own affidavit and *vivâ voce* examination (should the judge consider such examination desirable), subject, however, to the exceptions hereinafter contained, satisfy the judge that he has a sufficient cause of action against the defendant, either in respect of a money claim of or exceeding two hundred rupees or because he has sustained damage to that amount, and that he has no adequate security to meet the same, and that he does verily believe that the defendant is about to quit the island, and if he shall at the same time further establish to the satisfaction of the judge by affidavit or (if the judge shall so require) by *vivâ voce* testimony such facts that the judge infers from them that the defendant is about to quit the island, and will do so unless he be forthwith apprehended, such judge may order a warrant (form No. 100, schedule II.) to arrest the body of the defendant and to bring him before the court unless he shall give bail in, or make deposit of, such an amount as the said judge shall consider reasonable and adequate, which amount the said judge at the time of making the said order shall set out on the face thereof; and the said

warrant may be executed within one calendar month from the date thereof, including the day of such date, and not afterwards, in any district of the island. **Proviso.** Provided that if the plaintiff shall be in possession of any security in part, he or the person making the application on his behalf shall, on pain of punishment as for contempt of court, set forth the same particularly in his application and the amount thereof, which amount shall be deducted from the amount of security to be required from the defendant.

The shroff of a Banking Corporation is competent to make the affidavit under this section in an action in which the Corporation are plaintiffs [*The Bank of Madras v. Ponnasamy*, 2 C. L. R. 22].

651 The defendant being arrested on such warrant shall at once be brought up before the court by which it was issued in custody of the fiscal, unless he shall give reasonable security (form No. 101, schedule II.) to the fiscal to appear and answer the plaintiff's claim and to abide by and perform the judgment of the court, or to surrender himself or be surrendered to be charged in execution for the same ; in which case the fiscal shall be authorised to discharge him. If he is brought before the court under the warrant, or if he appears in discharge of the bail taken by the fiscal, he must give bail (form No. 102, schedule II.) to abide by and perform the judgment of the court, and pay any sum or sums which may be awarded against him, or to surrender himself or be surrendered by his sureties, to be charged in execution for the same ; or if he is unable or unwilling to give such bail, he shall be committed to prison (form No. 103, schedule II.) until he does so, or until the determination of the action ; and in the event of the decree being passed against him, then until the execution of the decree subject to the provisions of chapter XXII. in regard to imprisonment in execution of a decree for money ; and provided also that no person shall in any case be

Arrested
person to be
discharged on
giving bail,

otherwise
committed to
prison.

imprisoned under this section for a longer period than three months before decree.

Or instead of bail may make payment to fiscal.

652 The defendant may, instead of giving bail, as is hereinbefore directed, deposit with the fiscal or in court the sum mentioned in the warrant, and thereupon he shall be discharged from custody, and a minute of the same shall be made on the warrant; and the sum so deposited shall be applied in satisfaction of the judgment should the same eventually pass against the defendant, and the surplus, if any, shall be refunded to the defendant.

A District Court has no right to issue a writ of sequestration other than that sanctioned by this section [*Seyedoris v. Hendrick*, 1 S. C. R. 152; 2 C. L. R. 63]. *Per* DIAS, J., in the same case.—A power to issue any order either in the nature of a mandatory injunction or sequestration to prevent either of the parties to a suit from improperly interfering with the subject-matter in litigation is inherent in the court having jurisdiction over the parties to the subject in litigation. From the fact that the Code provides for injunctions and sequestration in certain cases only it cannot be inferred that all the powers of the court to issue sequestration orders, except in the cases specified in the Code, are abrogated.

Of sequestration before judgment.

653 If a plaintiff in any action, either at the commencement thereof or any subsequent period before judgment, shall, by way of motion on petition supported by his own affidavit and *vivâ voce* examination (if the judge should consider such examination necessary) satisfy the judge that he has a sufficient cause of action against the defendant, either in respect of a money claim of or exceeding two hundred rupees or because he has sustained damage to that amount, and that he has no adequate security to meet the same, and that he does verily believe that the defendant is fraudulently alienating his property to avoid payment of the said debt or damage; and if he shall at the same time further establish to the satisfaction of the judge by affidavit or (if the judge should so require) by *vivâ voce* testimony such facts that the judge infers from them that the

defendant is fraudulently alienating his property with intent to avoid payment of the said debt or damage, or that he has with such intent quitted the island leaving therein property belonging to him, such judge may order a mandate (form No. 104, schedule II.) to issue to the fiscal, directing him to seize and sequester the houses, lands, goods, money, securities for money and debts, wheresoever or in whose custody soever the same may be within his district, to such value as the court shall think reasonable and adequate and shall specify in the mandate, and to detain or secure the same to abide the further orders of the court.

Explanation.—Sequestration of immovable property has the effect of sequestering all rents and profits which proceed thereout, pending the sequestration.

The affidavit under this section need not necessarily be that of the plaintiff, but may be of any person having knowledge of the facts. The shroff of a Banking Corporation is competent to make such affidavit in an action in which the Corporation are plaintiffs [*Bank of Madras v. Ponnasamy*, 2 C. L. R. 23].

A District Judge can on good cause shown vacate an *ex parte* order of sequestration under this section [*Muttiah v. Muttusamy*, 1 N. L. R. 25].

A Court of Requests may order a mandate of sequestration under this section [*Perera v. Baba Appu*, 3 N. L. R. 93].

A decree for damages in an action to recover immovable property is a debt which comes within the class of property which can be sequestered under this section [*ibid*].

654 Before making the order for a warrant of arrest or mandate of sequestration, the judge shall require the plaintiff to enter into a bond (form No. 105, schedule II.), with or without sureties, in the discretion of the judge, to the effect that the plaintiff will pay all costs that may be awarded and all damages which may be sustained by reason of such arrest or sequestration, by the defendant or by any other person in whose possession such property shall have been so sequestered; and it shall be competent to the court to award such

But plaintiff before such warrant of arrest or sequestration is issued must give security.

damages and costs of suit either to the defendant or to those in whose possession such property shall have been so sequestered.

An attorney authorised by a Banking Corporation—"to sue, arrest, attach, distrain, seize, sequester, imprison and condemn and out of prison again to release, acquit, and discharge all persons; to sign, draw, make, or endorse any other security or securities in which the said bank is now or may hereafter be interested or concerned, or to which the signature of the said bank may be necessary or required : and further to sign, deliver, and execute all deeds, conveyances, and assurances to which the said Bank may become a party, and generally to act, do, manage, and transact all and every such matters and things in and about the premises in as full and ample a manner as the said Bank could do"—is competent to execute on behalf of the Bank the bond required by this section [*Bank of Madras v. Pomesamy*, 2 C. L. R. 22].

Who may
make affidavit
in lieu of
plaintiff.

655 In substitution for the affidavit of the plaintiff required by sections 650 and 653—

When the action is brought by the Attorney-General, then any officer of the Crown ; and

When the action is brought by a corporation, board, public body, or company, then any principal officer of such corporation, board, public body, or company ; and

When the plaintiff is absent from the island, then his attorney duly authorized to bring and conduct the action ; and

When the plaintiff, or if there are more plaintiffs than one when such of the plaintiffs as are in the island, or when such attorney of the plaintiff as is just above-mentioned is or are unable from want of personal knowledge or from bodily or mental infirmity to make the required affidavit, then any recognised agent of the plaintiff,

may be allowed by the court to make an affidavit in these matters instead of the plaintiff.

Provided that in each of the foregoing cases the person who makes the affidavit instead of the plaintiff must be a person having personal knowledge of the facts of the cause of action, and must in his affidavit swear or affirm that he deposes from his own personal knowledge of the matter therein contained, and shall be liable to be examined as to the subject-matter thereof at the discretion of the judge, as the plaintiff would have been if the affidavit had been made by him. Proviso.

The Shroff of a Banking Corporation is a "principal officer" of such Corporation within the meaning of this section [*Bank of Madras v. Ponnasamy*, 2 C. L. R. 22].

656 Any person wilfully making any false statement by affidavit or otherwise in the course of any of the proceedings aforesaid may be punished as for a contempt of court, besides his liability to be tried and punished for perjury where such statement is on oath or affirmation. Punishment for wilful false statement.

657 The sequestration ordered in pursuance of section 653 shall be made in the manner hereinbefore provided for sequestration or seizure of property preliminary to sale thereof in execution of a decree for money. Manner of sequestration.

See section 486 of the Indian Code.

Where goods to be sequestered are in the possession of a person other than the defendant they should not be seized in the usual way, but merely a written notice of the sequestration having issued should be given to the possessor [*Ramen Chetty v. Campbell*, 2 N. L. R. 94].

658 If any claim be preferred to the property sequestered before judgment, such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property seized in execution of a decree for money. Manner of investigating any claim to property sequestered.

See section 487 of the Indian Code.

Costs and
damages
where
sequestration
wrongful.

659 If upon any such investigation the court is satisfied that the property sequestered was not the property of the defendant, it shall pass an order releasing such property from seizure, and shall decree the plaintiff to pay such costs and damages by reason of such sequestration, as the court shall deem meet. If otherwise, the court shall disallow the claim, and make such order as to costs as it shall deem meet.

Where property sequestered is claimed, the only question for the court to decide is whether the claimant is owner [*Ramen Chetty v. Campbell*, 2 N. L. R. 94].

Effect of
sequestration
on prior
rights.

660 Sequestration before judgment shall not affect the rights, existing prior to the sequestration, of persons not parties to the action, nor bar any person holding a decree against the defendant from applying for the sale of the property under sequestration in execution of such decree.

See section 489 of the Indian Code.

Subsequent
seizure of
property
under decree
unnecessary.

661 Where property is under sequestration by virtue of the provisions of this chapter, and a decree is given in favour of the plaintiff, it shall not be necessary to again seize the property as preliminary to sale or delivery in execution of such decree.

See section 490 of the Indian Code.

Chapter 48.

Of Injunctions.

The provisions on this subject in the Indian Code commence from section 492.

When
injunction
may be
granted.

662 Every application for an injunction for any of the purposes mentioned in section 87 of "The Courts Ordinance, 1889," except in cases where an injunction is prayed for in a plaint in any action, shall be by petition, and shall be accompanied by an affidavit of the applicant or some other person having knowledge of the facts, containing a statement of the facts on which the application is based.

663 An injunction granted by the court on any such application may in case of disobedience be enforced by the punishment of the offender as for a contempt of court.

Disobedience to injunction how punished.

An injunction granted by a competent court must be obeyed by the party whom it affects until it is discharged, and disobedience can be punished as a contempt of court, notwithstanding irregularity in the procedure [*Silva v. Lewanaris*, 1 Tambyah's Rep. 33].

664 The court shall in all cases, except when it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction cause the petition of application for the same together with the accompanying affidavit to be served on the opposite party; and where the application is made after the defendant has answered, the injunction shall in no case be granted before such service. But the court may in its discretion enjoin the defendant until the hearing and decision of the application.

Application to be on notice to opposite party.

See section 494 of the Indian Code.

Under the Indian Procedure, where an injunction is granted without notice, the party aggrieved may either apply to have it discharged or he may appeal [*Amolak v. Sahib Singh*, I. L. R. 7 Alla. 550].

Interlocutory injunctions ought not to be granted without very good cause, when they may involve injury to persons not parties to the cause [*Silva v. Lewanaris*, 1 Tambyah's Rep. 33]. An injunction granted by a competent court must be obeyed by the party whom it affects until it is discharged, and disobedience can be punished as for a contempt of court, notwithstanding irregularity in the procedure [*ibid*].

665 An injunction directed to a corporation or board or other public body or company is binding not only on the corporation, board, public body, or company itself, but also on all members or officers of the corporation, board, public body, or company, whose personal action it seeks to restrain.

Effect on corporation. &c.

See section 495 of the Indian Code.

How set aside
or varied.

666 An order for an injunction made under this chapter may be discharged, or varied, or set aside by the court, on application made thereto on petition by way of summary procedure by any party dissatisfied with such order.

See section 496 of the Indian Code.

When court
may award
compensation
to respondent.

667 If it appears to the court that the injunction was applied for on insufficient grounds, or if, after the issue of an injunction which it has granted, the action is dismissed or judgment is given against the applicant by default or otherwise, and it appears to the court that there was no probable ground for applying for the injunction, the court may, on the application of the party against whom the injunction issued, award against the party obtaining the same in its decree such sum as it deems a reasonable compensation for the expense or injury caused to such party by the issue of the injunction. An award under this section shall bar any action for compensation in respect of the issue of the injunction.

See section 497 of the Indian Code.

Any person not desirous of taking advantage of the remedy given by this section may bring a regular suit [*Wilson v. Kanhya*, 11 W. R. 143].

Chapter 49.

Order for
sale of
perishable
property.

Of Interim Orders.

668 Any court may, on the application of any party to an action, order the sale by any person named in such order, and in such manner and on such terms as it thinks fit, of any movable property, being the subject of such action, which is subject to speedy and natural decay. The party carrying out the sale shall, within such time as the court shall limit, and after deducting thereout such expenses as the court allows him, deposit the proceeds of the sale in court to the credit of the action.

This section is substantially the same as section 498 of the Indian Code. See O. 52. R. 2, under the Judicature Acts.

669 The court may, on the application of any party to an action, and on such terms as it thinks fit—

Order for detention, preservation, or inspection of property.

- (1) Make an order for the detention, preservation, or inspection and survey of any property being the subject of such action ;
- (2) For all or any of the purposes aforesaid authorise any person to enter upon or into any land or building in the possession of any other party to such action ; and
- (3) For all or any of the purposes aforesaid authorise any samples to be taken, or any observation to be made, or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

See section 499 of the Indian Code and O. 52, R. 3, under the Judicature Acts.

An order under this section can only be made after summons has been served and reasonable notice has been given in writing [*Sengotha v. Ramasami*, I. L. R. 7 Mad. 241].

670 Every application under either of the two preceding sections shall be made by petition in the way of summary procedure ; and every party who is sought to be effected by the order must be named a respondent in the petition. Any such application may be made by a plaintiff after service of summons, or by a defendant after he has appeared in the action.

Application herein to be made by way of summary procedure.

See section 500 of the Indian Code and O. 52, R. 4, under the Judicature Acts.

Of the Appointment of Receivers.

Chapter 50.

671 Whenever it appears to the court to be necessary for the restoration, preservation, or better custody or management of any property, movable or immovable, the subject of an action or under sequestration, the court may on the application of any party who shall

When court may appoint a receiver.

establish a *prima facie* right to or interest in such property, by order—

- (1) Appoint a receiver of such property, and, if need be
- (2) Remove the person, in whose possession or custody the property may be, from the possession or custody thereof;
- (3) Commit such property to the custody or management of such receiver; and
- (4) Grant to such receiver such fee or commission on the rents and profits of the property by way of remuneration as the court thinks fit, and all such powers as to bringing and defending actions and for the realisation, management, protection, preservation, and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits and the execution of instruments in writing, as the owner himself has, or such of those powers as the court thinks fit.

And give him powers over subject of action or sequestration.

See section 503 of the Indian Code. The word "restoration" in the second line of this section is perhaps a mistake for "realisation." This is the word in the Indian Code.

By this section the court is not authorised to appoint a receiver merely to protect the pecuniary interests of one of two joint owners, but only to protect the property itself. When there is no reason to think that the property is in danger, or that the receiver could deal with it otherwise or better than the co-owner in possession, then the court ought to refuse to interfere [*Siya-doris v. Hendrick*, 1 S. C. R. 358; 2 C. L. R. 167].

When an order for a receiver is asked for, the applicant must have a right to the immediate possession of the particular property in respect of which the application is made, or a vested interest in it sufficient to entitle him to have it protected in circumstances which appear to the court to necessitate its protection by an independent and competent person [*ibid*].

The duties of a receiver are confined to realising, preserving, and managing the property for the collection of the moneys and profits due to the debtor. If he does anything beyond this, he must be looked on, not as an officer of court, but an agent for the judgment-debtor [*Tiel & Co. v. Abdool Hye*, 19 W. R. 37].

He has no estate or interest in himself, and his power to manage is created simply by the order of the court appointing him, and is binding only on the persons before the court [*Nilmadhab v. Gillander*, 2 Sev. 951].

As to whether a receiver can sue in his own name see *Spunmugan v. Moidin* [I. L. R. 8 Mad. 229; and *Khetter Mohan v. Wells*, I. L. R. 8 Cal. 719; *Gopolasami v. Sankara*, I. L. R. 8 Mad. 418].

The distinction between a case in which a temporary injunction may be granted and a case in which a receiver may be appointed, is that, while in each case it must be shown that the property should be preserved from waste or alienation, in the former case, it would be sufficient if it be shown that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged; while, in the latter case, a good *prima facie* title has to be made out [*Sidheswari v. Abhoyeswari*, I. L. R. 15 Cal. 818; *Chandidat v. Padmanand*, I. L. R. 22 Cal. 459].

A receiver to collect the rents of an estate is bound to make good a loss caused to it by a breach of his duties. A receiver is not justified in delegating or entrusting to another a duty entrusted to him by the court. He should in all important matters apply for and obtain the direction of the judge who appoints him. A receiver is entitled to his costs, charges, and expenses properly incurred in the discharge of his duties [*Balaji v. Ramchandra*, I. L. R. 19 Bom. 660].

In cases in which a receiver appointed at the instance of the judgment-creditor misappropriates moneys collected by him, the decree is not satisfied *pro tanto*, but the loss falls on the estate of its owner subject to the receiver's liability [*Orr v. Mutiah*, I. L. R. 17 Mad. 501, and 20 Mad. 224].

672 Notice of an application for the appointment of a receiver under this chapter must be served on the adverse party, unless he has left the island without leaving a recognised agent, or unless he has failed to appear in the action and the time limited for his appearance has expired; or if he has left a recognised agent, such notice may be given to such agent. Notice of application.

673 Every receiver so appointed as aforesaid shall— Receiver to give security and pass accounts.

- (1) Give such security (if any) as the court thinks fit duly to account for what he shall receive in respect of the property;

- (2) Pass his accounts at such periods and in such form as the court directs ;
- (3) Pay the balance due from him therein as the court directs ; and
- (4) Be responsible for any loss occasioned to the property by his wilful default or gross negligence.

See section 503 of the Indian Code.

Power of court to remove or require fresh security.

674 The court may at any time, on sufficient cause shown therefor, remove a receiver or require him to give fresh security.

Powers conferable by the court not to exceed those of parties themselves.

675 Nothing in sections 671 and 673 authorises or empowers the court to remove from the possession or custody of property under sequestration any person whom the parties to the action or some or one of them have or has not a present right so to remove.

PART 6.

OF SPECIAL PROCEEDINGS.

Chapter 51.

Of Reference to Arbitration.

Matter in difference in an action may by consent of parties be referred to arbitration.

676 If all the parties to an action desire that any matter in difference between them in the action be referred to arbitration, they may at any time before judgment is pronounced apply, in person or by their respective proctors, specially authorised in writing in this behalf, to the court for an order of reference.

Mode of submission.

Every such application shall be in writing, and shall state the particular matter sought to be referred, and the written authority of the proctor to make it shall refer to it, and shall be filed in court at the time when the application is made, and shall be distinct from any power to compromise or to refer to arbitration which may appear in the proxy constituting the proctor's general authority to represent his client in the action.

Appointment of arbitrator.

The arbitrator shall be nominated by the parties in such manner as may be agreed upon between them.

If the parties cannot agree with respect to such nomination, or if the person whom they nominate refuses to accept the arbitration, and the parties desire that the nomination shall be made by the court, the court shall nominate the arbitrator.

This section is comprised, substantially, of sections 506 and 507 of the Indian Code.

The chapter of the Code commencing with this section treats of voluntary references to arbitration. The Code hence repeals sections 10 to 19 and 30 to 33 inclusive of Ordinance No. 15 of 1866 and so much of sections 20 to 29 as regards voluntary references. The following are among the unrepealed sections of that Ordinance which contain chiefly the provisions regulating the procedure as to compulsory references to arbitration :—

Section 3.—All matters in dispute between parties, which may form the subject of civil action, and not that of an indictment or criminal proceeding, may be submitted to arbitration.

Section 4.—A submission to arbitration may be compulsory by order of court or voluntary by the consent of parties.

Section 5.—If at any time after the institution of an action, it shall appear to the satisfaction of the court that it relates wholly or in part to matters of mere account of an intricate and complicated character, which cannot conveniently be tried in the ordinary way, it shall be lawful for such court to order that such matters, either wholly or in part, be referred to one or more arbitrators to be nominated by the parties, or, if they cannot agree or refuse to nominate them, by the court itself, upon such terms as to the costs and otherwise as such court shall think reasonable. The award of the arbitrators or of the umpire shall be reported to the court, and shall, subject to the provisions hereinafter contained, be treated as if it were a finding of the court on the particular matter referred to arbitration.

Section 6.—If at the time of making reference, or at any time thereafter, it shall appear to the court, on a report to that effect made by the arbitrators, that the allowance or disallowance of any particular item in such account depends upon a question of law fit to be decided by the court, it shall be lawful for such court to try and determine such question, and the finding of the court thereupon shall be taken and acted upon by the arbitrators as conclusive.

Section 7.—In every case where reference shall be made to arbitration by the order of court as aforesaid, the court shall, in addition to the general power to remit conferred upon it by section 26, have power from time to time to remit the matters

referred, or any of them, for the re-consideration and re-determination of the said arbitrators or umpire, upon such terms as to costs and otherwise as to the court may seem proper.

Section 8.—Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any existing or future differences between them shall be referred to arbitration, and any one or more of the said parties, or any person claiming through or under them, shall nevertheless commence any action against the other party, or against any person claiming through or under them, in respect of the matters so agreed to be referred, it shall be lawful for the court in which the action is brought, on application by the defendants, or any of them, upon being satisfied that no sufficient reason exists why such matters cannot be referred to arbitration according to such agreement as aforesaid, and that the defendants or any of them were, at the time of the bringing of such action, and still are, ready and willing to join and concur in all acts necessary and proper for causing such matters to be decided by arbitration, to make an order staying all proceedings in such action, and compelling reference to arbitration on such terms as to costs and otherwise as to such court may seem fit. Provided always that any such rule or order may at any time afterwards be discharged or varied as justice may require.

Section 9.—The proceedings upon any compulsory arbitration shall, unless otherwise directed hereby or by the deed or instrument authorising the reference, be conducted in like manner, and subject to the same rules as to the power of the arbitrator and of the court, the attendance of witnesses, the production of documents, the enforcing or setting aside the award and otherwise, as upon a reference made by consent under a rule of court.

Section 20.—When a reference is made to arbitration by an order of court, or in pursuance of an agreement that such reference shall be made an order of court, the court shall issue the same process to the parties and witnesses whom the arbitrators or umpire may desire to have examined as the court is authorised to issue in suits tried before it; and persons not attending in consequence of such process, or making any other default, or refusing to give their testimony, or being guilty of any contempt to the arbitrators or umpire during the investigation of the suit, shall be made subject to the like disadvantages, penalties, and punishments, by order of the court, on the representation of the arbitrators or umpire, as they would incur for the same offence in suits tried before the court.

Section 21.—When in any order of reference, or in any submission to arbitration, containing an agreement that the submission shall be made a rule or order of court, it shall be

ordered or agreed that the parties and witnesses upon such reference shall be examined upon oath, it shall be lawful for the arbitrators or umpire, or any one arbitrator, and they are hereby authorised and required, to administer oaths to such witnesses, or to take their affirmation, in cases where affirmation is allowed by law instead of oath; and, if upon such oath or affirmation, any person making the same shall wilfully and corruptly give false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall be prosecuted and punished accordingly.

Section 22.—The arbitrators acting under any deed of submission, or compulsory order of reference, shall make their award under their hand, and (unless such document or order shall contain a different limit of time) within three months after they shall have been appointed and shall have entered on the reference, or shall have been called upon to act by a notice in writing from any party: but the court or the parties by consent in writing may enlarge the time for making the award. If no period be stated for the enlargement in such consent or such order for such enlargement, it shall be deemed to be an enlargement for one month; and, in any case when an umpire shall have been appointed, it shall be lawful for him to enter on the reference, in lieu of the arbitrators, if the latter shall have allowed their time, or their extended time, to expire without making an award, or shall have delivered to any party, or to the umpire, a notice in writing stating that they cannot agree.

Section 23.—When an award in a suit shall be made either by the arbitrators or the umpire, it shall be submitted to the court under the signature of the person by whom it may be made, together with all the proceedings, depositions, and exhibits in the suit.

Section 24.—It shall be lawful for the arbitrators or umpire, upon any reference, by an order of court, if they shall think fit, and if it is not provided to the contrary, to state their award as to the whole or any part thereof, in the form of a special case, for the opinion of the court.

Section 25.—The court may, on the application of either party, modify or correct an award, where it appears that a part of the award is upon matters not referred to the arbitrators (provided that such part can be separated from the other part and does not affect the decision on the matter referred), or where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision. The court may also, on such application, make such order as it thinks just respecting the costs of the arbitration, if any question arise respecting such costs and the award contain no sufficient provision concerning them.

Section 26.—In any of the following cases the court shall have power to remit the award or any of the matters referred to arbitration to the reconsideration of the same arbitrators or umpire, upon such terms as it may think proper ; (that is to say)—

- (1) If the award has left undetermined some of the matters referred to arbitration, or if it determine matters not referred to arbitration ;
- (2) If the award is so indefinite as to be incapable of execution ;
- (3) If an objection to the legality of the award is apparent upon the face of the award.

Section 27.—No award shall be liable to be set aside except on the ground of corruption or misconduct of the arbitrators or umpire. Any application to set aside an award shall be made within ten days after the same has been submitted to the court and notified to the parties in the suit, and not thereafter.

Section 28.—If the court shall not see cause to remit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid, and if no application shall have been made to set aside the award, or if the court shall have refused such application, the court shall proceed to pass judgment according to the award, or according to its own opinion on the special case if the award shall have been submitted to it in the form of a special case ; and the judgment which shall be so given shall be carried into execution in the same manner as other decrees of the court. In every case in which judgment shall be given according to the award, the judgment shall be final, and shall not be subject to appeal. Where the judgment shall be given in any case of compulsory reference, such judgment shall be subject to appeal.

Section 29.—If there be no cause pending in court, and the submission has not been made a rule of court, the mode of enforcing the award is by action on the bond of submission.

A reference to arbitration is bad unless it be made in writing either by the parties or the proctors specially authorised in that behalf. The want of these formalities is not cured by the parties subsequently appearing before the arbitrator [*Casim v. Dias*, 2 N. L. R. 319].

Pleaders cannot consent to a reference on behalf of their clients, nor a plaintiff on behalf of his co-plaintiff without special authority [*Moonshee Gaze v. Hameed*, 16 W. R. 160].

An agreement to refer to arbitration cannot be revoked, except for good cause. An arbitrary revocation is not permitted [*Pestonjee v. Manakjee*, 12 Moore, 130] ; and by good cause is meant

one of the causes mentioned in section 679 [*Halimbai v. Shanker*, I. L. R. 10 Bom. 381].

The word "court" in the corresponding section of the Indian Code has been held to include an appellate court [*Sangaralingampillai*, petitioner, I. L. R. 3 Mad. 78].

The special authority under this section to a proctor to refer a matter to arbitration need not be stamped [*Aitken, Spence & Co. v. Fernando*, 4 N. L. R. 35]. In this case—decided since the earlier part of this work had passed through the press—it may here be mentioned that the power of attorney in favour of the plaintiffs' "recognised agent" had not been filed at its institution, and on objection taken to the regularity of the proceedings the Supreme Court held that the requirement of section 25 (b) of the Code, that the power of attorney in favour of a "recognised agent" or a copy thereof should be filed in court, is complied with by such power or copy being filed at any stage of the suit and not necessarily when the recognised agent takes his initial step therein.

677 The court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the delivery of the award and specify such time in the order.

The matter in difference to be referred to arbitrator by order of court.

When once a matter is referred to arbitration, the court shall not deal with it in the same action, except as hereinafter provided.

This section is the same as section 508 of the Indian Code.

If no time is fixed in the order of court, the award falls to the ground [*Gunga Gobind v. Kalee Prosunno*, 10 W. R. 206]. See *contra*, *Mubarick v. Kadir* [7 Alla. 351; *Har Narain v. Bhagwant*, I. L. R. 10 Alla. 137].

An order after the time allowed is apparently invalid [*Bhugwan Doss v. Nund Lall*, I. L. R. 12 Cal. 173].

The arbitrators should confine themselves to the matters referred, and only take such legal evidence as is necessary to decide that [*Krishona Kanta v. Bidya Sundari*, 2 B. L. R. App. 25]. The decision of arbitrators in a matter not in difference between the parties, and not referred to them, is null and void [*Moshaheb Singh v. Konomutty*, 15 W. R. 172]. Arbitrators cannot delegate their power to others [*Surubjeet v. Gouree Pershad*, 7 W. R. 269].

When a dispute has been referred to arbitration, the court cannot deal with the matter in difference between the parties

except as provided in this chapter [*Halimbhai v. Shanker*, I. L. R. 10 Bom. 381]. It cannot go into the merits of the case [*Salig Ram v. Juma*, I. L. R. 4 Alla. 546] ; or dispose of it otherwise than under this chapter [*Haradhun v. Radhanath*, 10 W. R. 398].

When once an award has been delivered the court cannot grant further time or enlarge the period for the delivery of this award under section 683. Where an award was not made within the period fixed by the court's order, but was made after the date given in the last order extending the time for its delivery, *held*, that the award was invalid. The decree of the court dealing with the award as if duly made within the time could not be treated as enlarging it [*Raja Har Narain Singh v. Chandrain Bhagawant Kuar*, I. L. R. 13 Alla. 300].

Appointment
of an umpire.

678 If the reference be to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators—

- (a) By the appointment of an umpire ; or
- (b) By declaring that the decision shall be with the majority if the major part of the arbitrators agree ; or
- (c) By empowering the arbitrators to appoint an umpire ; or
- (d) Otherwise, as may be agreed between the parties ; or, if they cannot agree, as the court determines.

If an umpire is appointed, the court shall fix such time as it thinks reasonable for the delivery of his award in case he is required to act.

This section is the same as section 509 of the Indian Code.

If the order of reference does not provide for the appointment of an umpire in case of any difference of opinion among the arbitrators, the award must be made and signed by all the arbitrators [*Jungle Ram v. Ram Heet*, 19 W. R. 47]. If the decision lies with the majority, then their award in the absence of the minority, provided they have had due notice, is a legal award, unless their absence is due to one or other of the causes enumerated in section 679 [*Kedarnath v. Mussamut*, S. D. N. W. 1861, 541].

679 If the arbitrator, or where there are more arbitrators than one, any of the arbitrators or the umpire dies, or refuses, or neglects, or becomes incapable to act, or leaves the island under circumstances showing that he will probably not return at an early date, the court may in its discretion either appoint a new arbitrator or umpire in the place of the person so dying, or refusing, or neglecting, or becoming incapable to act, or leaving the island, or make an order superseding the arbitration, and in such case shall proceed with the action.

In event of death, &c., court may appoint new arbitrator ; or supersede arbitration.

See section 510 of the Indian Code.

The expression, "if an arbitrator refuses," means if he accepts and afterwards refuses. It does not justify a court in appointing new arbitrators against the wish of one of the parties, where the arbitrators first-named refused from the first [*Pugardin v. Moidinsu*, I. L. R. 6 Mad. 414]. The court cannot decline to accept the arbitrators' refusal and compel them to decide [*Shib Charan v. Ratiram*, I. L. R. 7 Alla. 20]. If any of the arbitrators refuse, an award by the remainder is invalid, and the court must either appoint new arbitrators or try the suit [*Nand Ram v. Fakir Chund*, I. L. R. 7 Alla. 523].

Consent of all parties is not necessary to obtain an order under this section [*Rampersad v. Juggernaxth*, 6 Cal. L. R. 1].

680 Where the arbitrators are empowered by the order of reference to appoint an umpire and fail to do so, any of the parties may serve the arbitrators with a written notice to appoint an umpire ; and if within seven days after such notice has been served, or such further time as the court may in each case allow, no umpire be appointed, the court, upon the application of the party who has served such notice as aforesaid, may appoint an umpire.

When court may appoint umpire.

Same as section 511 of the Indian Code.

681 Every arbitrator or umpire appointed under the foregoing sections shall have the like powers as if his name had been inserted in the order of reference.

Powers of umpire appointed after reference.

See section 512 of the Indian Code.

Court to issue
process.

682 The court shall issue the same processes to the parties and witnesses whom the arbitrators or umpire desire to examine, as the court may issue in actions tried before it.

Power of
arbitrators to
take evidence.

Persons not attending in accordance with such process, or making any other default, or refusing to give their evidence, or being guilty of any contempt to an arbitrator or umpire during the investigation of the matters referred, shall be subject to the like disadvantages, penalties, and punishments, by order of the court on the representation of such arbitrator or umpire, as they would incur for the like offences in actions tried before the court.

Same as section 513 of the Indian Code.

If the defendant does not appear, the arbitration may proceed *ex parte* [*Gokul Chund v. Girdharee Lall*, S. D. N. W. 1866, 83].

A person attending before an arbitrator appointed by order of court to take a reference is protected from arrest [*In the Matter of Jaggeshur Roy*, 5 Cal. L. R. 170].

Extension of
time for
award.

683 If from the want of the necessary evidence or information, or from any other cause, the arbitrators cannot complete the award within the period specified in the order, the court may, if it think fit, either grant a further time, and from time to time enlarge the period for the delivery of the award, or make an order superseding the arbitration, and in such case shall proceed with the action.

Same as section 514 of the Indian Code.

An award is not invalid merely because no time has been fixed for the making of it [*Mutthu Kutti v. Acha Nayakan*, I. L. R. 18 Mad. 22].

The court can enlarge the time for the delivery of the award without the consent of or even notice to the parties to the action [*Mahamado v. Perera*, 1 S. C. R. 134; *Punchiralle v. Suddahamy*, 1 N. L. R. 38] even if such enlargement is opposed by the parties [*Gobind Chunder v. Ram Kishen*, 2 W. R. 297] and even after the period for delivery of the award has expired [*Har Narain v. Bhagwan*, I. L. R. 10 Alla. 137], unless the award has been delivered [*Har Narain v. Bhagwant*, I. L. R. 13 Alla. 300].

The court may, under this section, extend the time for delivering the award on the motion of the arbitrator himself beyond the period specified in the original order [*Perera v. Francisco*, 3 N. L. R. 384].

684 When an umpire has been appointed, he may enter on the reference in the place of the arbitrators—

When umpire may enter on the reference in lieu of arbitrators.

(a) If they have allowed the appointed time to expire without making an award ; or

(b) When they have delivered to the court or to the umpire a notice in writing stating that they cannot agree.

Same as section 515 of the Indian Code.

The court can extend the period within which the umpire is to give his award [*Kuper Run v. Venkataramayar*, I. L. R. 4 Mad. 311].

685 When an award in an action has been made, the persons who made it shall sign it and cause it to be filed in court, together with any depositions and documents which have been taken and proved before them ; and notice of the filing shall be given to the parties.

Award to be filed in court.

Same as section 516 of the Indian Code.

Arbitrators cannot delegate their authority to others [*Surubjeet v. Gouree Pershad*, 7 W. R. 269]. An award under this section should be a single instrument complete in itself, and should not consist of two papers bearing different dates [*Joy Mungul v. Mohan Ram*, 12 W. R. 397].

The arbitrator should not allow documents entrusted to him by the court to be removed from the record [*Joy Mungul v. Mohan Ram*, 12 W. R. 397].

One party may agree to be bound by the oath of the other before an arbitrator [*Bhagirath v. Ram Ghulam*, I. L. R. 4 Alla. 283].

After the award is made and filed the functions of the arbitrators cease [*Dutto Singh v. Dosad*, I. L. R. 9 Cal. 575].

It is necessary that all the arbitrators agree to the terms of the award, but there is no provision of law requiring them to sign it in the presence of one another [*Muthukutti v. Acha Nayakan*, I. L. R. 18 Mad. 22].

Award may be in form of special case.

686 Upon any reference by an order of court the arbitrators or umpire may, with the consent of the court, state the award as to the whole or any part thereof in the form of a special case, for the opinion of the court; and after the filing of such special case upon notice to the parties, the court shall upon an appointed day hear argument and deliver its opinion thereon; and such opinion shall be added to and form part of the award.

See section 517 of the Indian Code.

Application to set aside or correct the award.

687 Within fifteen days from the date of receipt of notice of the filing of the award any party to the arbitration may by petition apply to the court to set aside the award, or to modify or to correct the award, or to remit the award to the arbitrators for reconsideration, on grounds mentioned in the following sections.

It is competent to the court to modify or correct an award or remit it to the arbitrator of its own motion without any application therefor by any party under this section [*Hendrick v. Juanis Naide*, 3 C. L. R. 60].

When court may correct award.

688 The court may, by order, modify or correct an award—

- (a) Where it appears that a part of the award is upon a matter not referred to arbitration, provided such part can be separated from the other part and does not affect the decision on the matter referred; or
- (b) Where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision.

Same as section 518 of the Indian Code.

An award on a matter not referred is null and void [*Moshaheb Singh v. Konomutty*, 15 W. R. 172].

When certain points have been referred by the judge, and others by the parties themselves, separate awards should be given instead of mixing them all up and giving one general award [*Roghoo Nundun v. Banwaree*, 3 W. R. Mis. 27].

689 The court may also make such orders as it thinks fit respecting the costs of the arbitration, if any question arises respecting such costs and the award contains no sufficient provision concerning them.

and make
order as to
costs.

Same as section 519 of the Indian Code.

If the submission does not leave the question of costs to the arbitrators, they cannot enter into the question, and if they do the judge should refuse to file the award [*Dagdusa v. Bhukan*, I. L. R. 9 Bom. 82].

Where all matters in difference between the parties are referred to arbitration under an order of court, the arbitrator has power to award interest after the date of the submission, and to deal with the costs of the reference and award [*Mohanlal v. Nathuram*, 1 B. L. R. 144].

690 The court may remit the award on any matter referred to arbitration to the reconsideration of the same arbitrators or umpire, upon such terms as it thinks fit—

When court
may remit
award for re-
consideration.

- (a) Where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration;
- (b) Where the award is so indefinite as to be incapable of execution;
- (c) Where an objection to the legality of the award is apparent upon the face of it.

This section is the same as section 520 of the Indian Code, except that in the first line the word "or" occurs instead of the word "on."

The court must construe the award by the language of the award itself, and not by the oral evidence of the arbitrators [*Guneshee v. Chotay Lal*, 3 Alla. 117].

Where the arbitrators have neglected to decide issues essential to the determination of the case, and refuse to do so when the case is remitted, the court must try the case [*Jonardin v. Sambhunath*, I. L. R. 16 Cal. 806].

An award cannot be remitted under this section unless the illegality is apparent on the face of it [*Nanuk Chand v. Ram Narayan*, I. L. R. 2 Alla. 181].

In *Makund Ram v. Salig Ram* [I. L. R. 21 Cal. 590] it was held that the ground for holding an award to be invalid on account of its not disposing of all the matters referred appeared to be that there is an implied condition in the submission of the parties to the arbitration that the award should dispose of all, and that that condition might be waived by the consent of the parties before the arbitrator.

When an
award is void ;

691 An award remitted under section 690 becomes void on the refusal of the arbitrators or umpire to reconsider it.

when it may
be set aside.

No award shall be set aside except on one of the following grounds, namely :

- (a) Corruption or misconduct of the arbitrator or umpire ;
- (b) Either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire ;
- (c) The award having been made after the issue of an order by the court superseding the arbitration and restoring the action ;

When it is not
valid,

and no award shall be valid unless made within the period allowed by the court.

Same as section 521 of the Indian Code.

An award will be set aside for anything known as misconduct in English Law [*Ganga Sahai v. Lekrag Singh*, I. L. R. 9 Alla. 253]. The Code implies that the arbitrators shall all be present at such meetings as are essential to the validity of the award [*Nand Ram v. Fakir Chand*, I. L. R. 7 Alla. 523]; and when two out of three arbitrators examined witnesses in the absence of the third the award was set aside [*Thanmiraju v. Bapiraju*, I. L. R. 12 Mad. 113]. So, where the arbitrators refused to hear witnesses produced by either party the award was set aside [*Rughoobur Dyal v. Maina Koer*, 12 Cal. L. R. 564].

An award after the time allowed is invalid [*Ram Manohar v. Lal Behari*, I. L. R. 14 Alla. 343]; but the court has the fullest powers to enlarge the time before an award is completed [*Lakshminarasimham v. Somasundaram*, I. L. R. 15 Mad. 384].

The mere fact that the arbitrators consulted a person supposed to be versed in law is not a valid objection to the award [*Chowdhry v. Mussumut*, 3 Suth. P. C. R. 342].

An arbitrator ought not to hear or receive evidence from one side in the absence of the other without (if he does) giving the other side affected by such evidence the opportunity of meeting and answering it. The parties may, however, *agree* that a reference may be conducted in any particular way, and such an agreement may be either express or implied from their conduct during the arbitration, and they may also expressly or by their conduct waive their objection to an irregular course of conduct on the part of the arbitrator [*Cursetji v. Crowder*, I. L. R. 18 Bom. 299].

The misconduct contemplated by this section is legal, not moral misconduct [I. L. R. 9 Alla. 253, 264]. Refusal to reconsider an award remitted is misconduct [3 Suth. Civ. R. 168]. So is signing the award without having attended or taken any interest in the proceedings [22 Suth. Civ. R. 418].

An arbitrator cannot under the Roman-Dutch Law proceed in the absence of one of the parties, and where he hears a case *ex parte* he is guilty of misconduct under this section, and his award will be set aside [*Aitken, Spence & Co. v. Fernando*, 4 N. L. R. 35]. See *Voet ad Pand.*, 4. 8. 15. and *l. quid tamen* 21 § *si quis ex litigatoribus* 9 *l. diem* 27 § *si quis litigatorum* 4 ff. *h. t.*

692 If the court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid, and if no application has been made to set aside the award, or if it has been made and the court has refused such application, then the court shall, after the time for making such application has expired, on a day of which notice shall be given to the parties, proceed to give judgment according to the award; or, if the award has been submitted to it in the form of a special case, according to its own opinion on such case.

Judgment to be according to the award.

Upon the judgment so given a decree shall be framed, and shall be enforced in manner provided in this Ordinance for the execution of decrees. No appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award.

And decree to be framed thereon.

See section 522 of the Indian Code.

No appeal lies from a judgment in terms of an award upon a voluntary reference in a pending suit even when the party

aggrieved wishes not to attack the award on its merits, but to question its validity on legal grounds [*Casseem v. Packeer*, 2 C. L. R. 69. But see *infra*].

A decree which does not strictly follow the award is appealable [*Jawahir Singh v. Mul Raj*, I. L. R. 8 Alla. 449].

An appeal would not lie from a decree passed upon a judgment given according to an award merely because there may have been some irregularities in the procedure of the arbitrator, such alleged irregularities having been considered by the court which passed the decree, and having been found by that court not to be of such a nature as to render the award no award in law [*Ram Dhan Singh v. Karam Singh*, I. L. R. 18 Alla. 414].

In the case of a decree upon a judgment or an award an appeal will lie on the ground that the so-called award is, from one cause or another, no award in law. Where an application to set aside an award on the ground of misconduct of an arbitrator was made and the court refused it after judicial determination, *held*, that no appeal based on any similar ground lay from the decree, but an appeal would lie where in such a case the court passed its decree without considering the application, or where it did not allow sufficient time to the parties to file objections to the award [*Ibrahim Ali v. Mohsin Ali*, I. L. R. 18 Alla. 422].

An appeal will lie if the award is shown to be illegal and void *ab initio* [*Saturjit v. Dulhin Gulab*, I. L. R. 24 Cal. 469].

Where judgment is passed in accordance with an award, and a question arises whether the award is a legal award, an appeal lies from the judgment—*Debendra Nath v. Aubhoy* [I. L. R. 9 Cal. 905]. See also 11 Cal. 41 and 6 Alla. 174, and, *contra*, *Aitken, Spence & Co. v. Fernando* [4 N. L. R. 35].

Under the corresponding section of the Indian Code it was held that the section assumed that the conditions existed for passing a decree, that is to say, an award regularly and properly arrived at by arbitrators duly appointed [*Rigardin Ravutan v. Mohidinsa Ravutan*] [I. L. R. 6 Mad. 415 ; see also *Iswahar Singh v. Mul Roy*, 8 Alla. 449].

Where an appeal has been filed against an order of the District Judge refusing to set aside an award he ought not to enter up a decree under this section in terms of the award, but should wait until the Supreme Court decides whether the award should stand or not [*Aitken, Spence & Co. v. Fernando*, 4 N. L. R. 35].

Agreement to refer any difference to arbitration may be filed in court.

693 When any persons agree in writing that any difference between them shall be referred to the arbitration of any person named in the agreement, or to be appointed by any court having jurisdiction in the matter

to which the agreement relates, the parties thereto, or any of them, may apply that the agreement be filed in such court.

The application shall be by petition in the way of summary procedure as hereinbefore provided, in which the parties to the agreement other than the petitioner or petitioners shall be named respondents.

Application
therefor.

See section 523 of the Indian Code.

An agreement to refer an existing dispute to arbitration is binding and capable of enforcement like any other lawful agreement by the parties to it and by and against them only [*Hira Sing v. Gunga Sahai*, I. L. R. 6 Alla. 322].

A general agreement to refer future differences to arbitration comes within this section, and may be filed under it. The section is not confined to cases in which a dispute actually existing at the date of the agreement is agreed to be referred to arbitration. But the agreement must name the arbitrator, and an agreement which provides for the future appointment or election of arbitrators does not fall within this section [*Fazulbhoy v. Bom. and Persia Steam Navigation Co.*, I. L. R. 20 Bom. 232].

694 On such application being made, if no sufficient cause be shown to the contrary, the court may cause the agreement to be filed, and shall make an order of reference thereon; and may also nominate the arbitrator when he is not named therein and the parties cannot agree as to the nomination.

Court to
order
reference
thereon.

See section 523 of the Indian Code.

The effect of this clause is to give the parties to an agreement power to nominate the arbitrator even when they have agreed that he shall be appointed by the court [*Fazulbhoy v. Bom. and Persia Steam Navigation Co.*, I. L. R. 20 Bom. 232].

695 The foregoing provisions of this chapter, so far as they are consistent with any agreement so filed, shall be applicable to all proceedings under an order of reference made by the court under the last preceding section, and to the award of arbitration and to the enforcement of the decree founded thereupon.

Provisions of
this chapter
to apply to
such
reference.

Same as section 524 of the Indian Code.

The words "so far as they are consistent with any agreement so filed" do not mean that the agreement must contain in every case an express provision as to what ought to be done if any arbitrator is unwilling to act, in order that a judge may act in conformity to it, and that this section has otherwise no application. The reasonable construction is that the action of the judge under section 510 should not be inconsistent with the agreement, if it contains any special provision on the subject [*Balu-Pattabhirama Chetti v. Seetharama Chetti*, I. L. R. 17 Mad. 498].

Award made on a reference independently of court may be filed in court.

696 When any matter has been referred to arbitration without the intervention of a court of justice, and an award has been made thereon, any person interested in the award may within six months of the making of the award apply to the court having jurisdiction over the matter to which the award relates, that the award be filed in court.

See section 525 of the Indian Code.

The award should be filed with the application [*Himutoollah v. Heerun*, 13 W. R. 62]; otherwise the court cannot act [*Gopi v. Mahanandi*, I. L. R. 12 Mad. 331]; but secondary evidence of its contents is admissible if the award has been lost [*Gopi Reddi v. Mahanandi*, I. L. R. 15 Mad. 99].

Where an application is made under this section, and objections such as fall within section 691 are raised, the court is not bound to hold its hand and reject the application, but it must inquire into the validity of the objections. When on such an application an objection is taken that the matters in dispute were never referred to arbitration, the court has no power to deal with it, but should reject the application and refer the parties to a regular suit [*Surjan v. Bhikari*, I. L. R. 21 Cal. 213; *Tegpur v. Mahomed*, I. L. R. 20 Bom. 596].

This section is not imperative upon a person who seeks to enforce his award. He may do so in a regular suit [*Palaniappa Chetty v. Rayappa*, 4 Mad. 119]; or he may sue on the alternative or the original state of facts [*Narasayya v. Ramabadra*, I. L. R. 15 Mad. 474].

Application therefor.

697 The application shall be by petition in the way of summary procedure as hereinbefore provided, in which the parties to the arbitration other than the petitioner or petitioners shall be named respondents.

See section 525 of the Indian Code.

698 If on the hearing of such application no ground, such as is mentioned or referred to in sections 690 or 691, be shown against the award, the court shall order it to be filed, and such award shall then take effect as an award made under the provisions of this chapter.

See section 526 of the Indian Code.

The court has no power to remit an award to private arbitrators over whose proceedings it has no control [*Dagdusa v. Bhukan*, I. L. R. 9 Bom. 82].

If the award is filed the court should then proceed to pass judgment according to the award and draw up a decree [*Himutoolah v. Heerim*, 13 W. R. 62]. If the award be rejected it is not null and void, and the applicant can sue to enforce it in a regular suit [*Kota Seetamma v. Kolepurla*, 8 Mad. 81; *Nursing v. Puttboo*, 20 W. R. 420].

In this section the word "shown" is not equivalent to "alleged," but it is necessary that one of the grounds mentioned in section 690 or section 691 should be proved to the satisfaction of the court before the court is justified in refusing to file the award [*Jaggan Nath v. Mannu Lal*, I. L. R. 16 Alla. 231].

Of Proceedings on Agreement of Parties.

Chapter 52.

699 Parties claiming to be interested in the decision of any question of fact or law may enter into an agreement in writing, stating such question in the form of a case for the opinion of the court, and providing that, upon the finding of the court with respect to such question—

Agreed statement of case for decision of court.

- (a) A sum of money fixed by the parties, or to be determined by the court, shall be paid by one of the parties to the other of them; or
- (b) Some property, movable or immovable, specified in the agreement, shall be delivered by one of the parties to the other of them; or
- (c) One or more of the parties shall do, or refrain from doing, some other particular act specified in the agreement.

Every case stated under this section shall be divided into consecutively numbered paragraphs, and shall

concisely state such facts and documents as may be necessary to enable the court to decide the question raised thereby.

Same as section 527 of the Indian Code.

When value of property is to be stated therein.

700 If the agreement is for the delivery of any property or for the doing, or the refraining from doing, any particular act, the estimated value of the property to be delivered, or to which the act specified has reference, shall be stated in the agreement.

Same as section 528 of the Indian Code.

To what court agreement may be presented.

701 The agreement, if framed in accordance with the rules hereinbefore contained, may for the determination of the question or questions thereby raised be brought before the court which would have jurisdiction to entertain an action, the amount or value of the subject-matter of which is the same as the amount or value of the subject-matter of the agreement. And for this purpose it shall be presented to the court as an exhibit to a petition preferred by one or more of the parties to the agreement in the way of summary procedure, to which petition the other parties to the agreement shall be named respondent, and in which petition it shall be alleged that the agreement was duly executed by all the parties and that the controversy is real, and that the agreement is submitted *bonâ fide* for the purpose of determining the rights of the parties; such petition shall be verified by affidavit, and the prayer of the petition shall conform to the stipulations of the agreement within section 699.

See section 529 of the Indian Code.

Judgment and decree thereon.

702 If at the hearing of this petition on consideration of the evidence before it the court is satisfied that the allegations of the petition are established, and is further of opinion that the subject of the agreement is fit to be decided, then it shall proceed to pronounce

judgment between the parties upon the facts and questions stated in the agreement, and upon the judgment so given a decree shall be framed and passed, and shall be enforced in the manner provided in this Ordinance for the execution of decrees.

See section 531 of the Indian Code.

The facts required to be proved under this section may be proved by affidavit [*Kraal v. Whympere*, I. L. R. 17 Cal. 786].

The court will not proceed if it appears that there is no matter really in controversy between the parties [*Deo v. Dunrre*, 6 C. B. 100].

Of Summary Procedure on Liquid Claims.

Chapter 53.

The procedure under this chapter is not applicable to Courts of Requests [*Siman v. Nonohamy*, 9 S. C. C. 206].

Nor is this procedure applicable to actions on mortgage bonds [*Dissanaike v. De Zilva*, 2 C. L. R. 55].

In an action under this chapter the defendant cannot be heard or allowed to take any objection to the regularity of the procedure without having first obtained the leave of the court to appear and defend [*Carpen v. Mamlan*, 3 C. L. R. 11; *Mathar v. Crowther*, 3 C. L. R. 31].

An action on a foreign judgment cannot be brought under the provisions of this chapter [*Meerapullailebbe v. Noohoollebbe*, 3 C. L. R. 32]. Nor is the summary procedure under this chapter to be adopted where the plaintiff has a second cause of action as for money lent. If a plaint under this chapter embraces such cause of action, it should be returned for amendment [*Allie v. Mohideen*, 1 N. L. R. 39].

703 All actions where the claim is for a debt or liquidated demand in money arising upon a bill of exchange, promissory note, or cheque, or instrument or contract in writing for a liquidated amount of money, or on a guarantee where the claim against the principal is in respect of such debt or liquidated demand, bill, note, or cheque, may, in case the plaintiff desires to proceed under this chapter, be instituted by presenting a plaint in the form prescribed by this Ordinance; but the summons shall be in the form No. 19 contained in the second schedule hereto annexed, or in such other form as the Supreme Court may from time to time prescribe.

Action by summary procedure on liquid claims.

See section 532 of the Indian Code.

At the expiration of the time stated in the summons issued under this section a plaintiff is not by right entitled to demand entry of judgment in his favour, but he has a right to move for it. The court can, in its discretion, extend the time for answer [*Ulaganathan v. Varassa*, 3 N. L. R. 52].

Leave
required to
defend.

704 In any case in which the plaint and summons are in such forms respectively, the defendant shall not appear or defend the action unless he obtains leave from the court as hereinafter mentioned so to appear and defend; and in default of his obtaining such leave or of appearance and defence in pursuance thereof, the plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons, together with interest to the date of payment, and such costs as the court may allow at the time of making the decree.

Without such
leave decree
at once with
speedy
execution.

Proviso.

The defendant shall not be required, as a condition of his being allowed to appear and defend, to pay into court the sum mentioned in the summons, or to give security therefor, unless the court thinks his defence not to be *prima facie* sustainable, or feels reasonable doubt as to its good faith.

See section 532 of the Indian Code.

Where there has been insufficient service of summons on a defendant, such irregularity is cured by his appearance. If the service of summons is insufficient, the defendant need not appear, but should, if judgment is signed upon irregular service, apply then to have the judgment set aside [*Mathar v. Crowther*, 3 C. L. R. 31].

A plaintiff's motion for judgment under this section was resisted by the defendant on technical grounds. The District Judge disallowed the motion, but refused defendant his costs on the ground that his opposition was intended simply to delay payment of his just debts—*held*, that the defendant's opposition having been successful, he was entitled to the costs of it, there being nothing to take the matter out of the general rule that costs follow the event; and that the court could not speculate as to defendant's motives or as to the ultimate issue of plaintiff's claim [*The National Bank of India v. Ponnasamy*, 9 S. C. C. 126].

Where in an action on a promissory note the defendant pleaded payment partly in cash and partly in notes since retired—*held*,

that the defence in itself could not be regarded as one marked by bad faith or not *primâ facie* sustainable, and the case was not, therefore, one in which the defendant should, under this section, be required, as a condition of his being allowed to appear and defend, to pay into court the sum mentioned in the summons, or to give security therefor [*Letchimin v. Theravappa*, 2 N. L. R. 69].

The court cannot, under this section, order the defendant to bring the money into court as a condition of being allowed to defend, unless the defence set up is bad in law, or the court has reasonable doubt (that is to say, doubt for which reasons could be given) as to its good faith [*Annamalay v. Allien*, 2 N. L. R. 251].

705 The plaintiff who so sues and obtains such summons as aforesaid must on presenting the plaint produce to the court the instrument on which he sues, and he must make affidavit that the sum which he claims is justly due to him from the defendant thereon. If the instrument appears to the court to be properly stamped, and not to be open to suspicion by reason of any alteration or erasure or other matter on the face of it, and not to be barred by prescription, the court may in its discretion make an order for the service on the defendant of the summons above mentioned. The day to be inserted in the notice as the day for the defendant's appearance shall be as early a day as can be conveniently named, regard being had to the distance of the defendant's residence from the court.

Instrument to be produced with the plaint on affidavit.

Summons to be of short date.

There is no provision in the Indian Code for an affidavit as required by this section. The reason, perhaps, is because, under the Indian Procedure, all plaints have to be verified. See sections 51 and 52 of the Indian Code.

"The plaintiff must make affidavit," &c.—A corporation could not take advantage of summary procedure under this chapter. being incapable of making an affidavit [*The Bank of Madras v. Ponnasamy*, 9 S. C. C. 169]. It was, however, provided by section 11 of Ordinance No. 12 of 1895, that the provisions of section 655 in respect of the affidavit of the plaintiff required by sections 650 and 653 should extend to affidavits required by this section.

In an action by two joint payees of a promissory note against the makers the affidavit under this section was made by one—held, that such affidavit was insufficient [*Vengudasalem v. Ravter*, 3 C. L. R. 39].

The omission in the affidavit of the fact that the claim is "justly due," as required by this section, disentitles a plaintiff to the benefit of summary procedure under this chapter [*Annamalai v. Allien*, 2 N. L. R. 251].

A plaintiff suing on an insufficiently stamped promissory note is not entitled to the privileges of this chapter [*Ulaganathan v. Vavassa*, 3 N. L. R. 52].

When leave
to defend
may be
granted.

706 The court shall, upon application by the defendant, give leave to appear and to defend the action upon the defendant paying into court the sum mentioned in the summons, or upon affidavits satisfactory to the court, which disclose a defence or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the court may deem sufficient to support the application and on such terms as to security, framing, and recording issues, or otherwise, as the court thinks fit.

This section is the same as section 533 of the Indian Code.

In the calculation of the time within which a defendant is to obtain leave to appear and defend Sundays and public holidays are to be included, but when the last day of the period allowed falls on a Sunday or public holiday, the defendant may move on the next court day [*Nallan v. Ossen*, 2 N. L. R. 381].

If the defendant appears and discloses any defence, legal or equitable, he will be allowed to appear and defend [*Casella v. Darton*, L. R. 8, C. P. 100]; but where there is reason to doubt its *bonâ fides* the condition of paying the money into court or bringing in security will be imposed [*Agra Masterman's Bank v. Leighton*, L. R. 2 Ex. 53; *Ramlal v. Haran*, 3 B. L. R. 130]; and where a conditional order is passed, and the condition is not performed, the order is a nullity, and subsequent steps to set it aside are unnecessary [*Gourdos Mistry v. Hewitt*, 12 W. R. 9]. Leave to appear may be granted *ex parte*; but the plaintiff can show by affidavit that the leave ought not to have been granted; or, if granted at all, granted on more stringent terms [*Vonlinzgy v. Narayan Singh*, 6 B. R. App. 64].

In giving leave to defend the court has a discretion to order security for costs not only where there is a doubt as to the *bonâ fides* of the defence, but also where it appears unnecessary, though allowable [*Vonlinzgy v. Narayan*, 6 B. L. R. App. 64].

A cross claim, in ordinary cases, cannot be set up as a defence, except when it arises out of the very transaction sued upon, and

is in the nature of a set-off [*Roulet v. Fetterle*, I. L. R. 18 Bom. 717]. But see *Whitham v. Pitche Mutoo* [1 Browne 61].

707 After decree the court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to appear to the summons and to defend the action, if it seem reasonable to the court so to do, and on such terms as the court thinks fit.

When court may set aside decree, &c.

This section is the same as section 534 of the Indian Code.

A decree for default would be set aside under this section if the plaint and summons were not in proper form. Where a defendant is advised that the plaint and summons do not disclose a case appropriate to this chapter the more prudent course for him to adopt would be to move the court on notice for leave to appear, and apply that the order allowing the summons to issue be discharged [*Meerapullebbe v. Noohoolebbe*, 3 C. L. R. 111].

If, under this section, the defendant shows sufficient cause why the decree against him for default of appearance should be set aside, he is entitled to be allowed to enter into his defence, and he cannot be called upon to give security except for good reasons [*Allie v. Mohideen*, 1 N. L. R. 39].

Irregular service of summons on two out of three defendants to an action brought on a joint promissory note, does not give the defendant properly served any ground to question the decree passed against him [*Ewing & Co. v. Gosuidas*, 2 B. L. R. App. 7].

708 In any proceeding under this chapter the court may order the instrument on which the action is founded to be forthwith deposited with an officer of the court, and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof.

Court may order deposit of instrument.

Same as section 535 of the Indian Code.

709 The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance, or non-payment, or otherwise, by reason of such dishonour, as he has under

Recovery of expenses incurred in noting.

this chapter for the recovery of the amount of such bill or note.

Same as section 536 of the Indian Code.

Saving
clause.

710 Except as provided in this chapter, the procedure in actions under this chapter shall be the same as the procedure in actions instituted under chapter VII.

See section 537 of the Indian Code.

Special trial
roll to be
kept.

711 In every court in which cases may be instituted under this chapter, a special trial roll shall be kept of such cases in which issue has been joined. And it shall be competent for the judge of such court to order such cases to be set down for hearing on such days, and on the day fixed for the hearing of any such case to direct the same to be called on for trial, in such order as to him shall appear best calculated to promote the ends of justice, any rule or practice of such court to the contrary notwithstanding; provided that the parties to such case shall have received reasonable notice of the day of hearing.

PART 7.

OF THE AIDING AND CONTROLLING OF EXECUTORS AND ADMINISTRATORS AND THE JUDICIAL SETTLE- MENT OF THEIR ACCOUNTS.

Chapter 54.

Of Aiding, Supervising, and Controlling Executors and Administrators.

[The procedure under this chapter and the next has been borrowed, adapted to local requirements, from the provisions of the Code of Civil Procedure of the State of New York regulating the practice of the Surrogates' Courts of that State. The jurisdiction of these courts, as defined by section 2472 of the New York Code, extends to admitting wills to probate, granting and revoking letters testamentary and letters of administration, and such other business].

Proceedings
to discover
property
withheld, &c.

712 An executor or administrator may present to the court from which grant of probate or administration issued to him a petition entitled as of the action in

which such grant issued, setting forth upon knowledge, or information and belief, any facts tending to show that money or other movable property which ought to be delivered to the petitioner, or which ought to be included in his inventory and valuation, is in the possession, under the control, or within the knowledge or information of a person who withholds the same from him, or who refuses to impart any knowledge or information he may have concerning the same, or to disclose any other fact which will in any way aid the petitioner in making discovery of such property, so that it cannot be inventoried and valued: and praying an inquiry respecting it, and that the person complained of may be cited to attend the inquiry and to be examined accordingly. The petition may be accompanied by affidavits or other evidence tending to support the allegations thereof. If the court is satisfied upon the materials so presented that there are reasonable grounds for inquiry, it shall issue a citation accordingly, which may be made returnable forthwith, or at such future time as the court shall direct.

See section 2706 of the New York Code.

In the case of a petition under this section, if the respondent puts in an affidavit claiming to be owner of the property in respect of which discovery is sought, the only thing for the court to do is to dismiss the petition. No examination or cross-examination of the respondent can be granted. The court can order no costs in proceedings for discovery under this section [*In the Matter of the Last Will of Cornelis Dias*, 2 N. L. R. 252].

713 There shall be annexed to, or endorsed on, the citation an order signed by the judge, requiring the person cited to attend personally at the time and place therein specified. The citation and order must be personally served, and the service shall be ineffectual unless it is accompanied with payment or tender of the sum required by law to be paid or tendered to a witness subpoenaed to attend a trial in a civil court.

Order to
accompany
citation.

Service of.

Failure to
obey.

Failure to attend as required by the citation and order may be punished as a contempt of court.

See section 2708 of the New York Code.

Examination
of person
cited.

714 Upon the attendance of a person in obedience to such citation and order, he shall be examined fully and at large, on oath or affirmation, respecting any money or other property of the testator or intestate, or of which the testator or intestate was in possession at the time of or within two years preceding his death. A refusal to be sworn or to answer any question allowed by the court is punishable in the same manner as a like refusal by a witness in a civil case. In case the person cited puts in an affidavit that he is the owner of any of the said property, or is entitled to the possession thereof by virtue of any lien thereon or special property therein, the proceedings as to such property so claimed shall be dismissed.

Refusal to
answer.

See section 2710 of the New York Code.

Further
evidence.

715 In the absence of the affidavit last mentioned, either party may on any such inquiry produce further evidence in like manner and with like effect as upon a trial.

See section 2711 of the New York Code.

Decree
awarding
possession to
the
petitioner,
unless
security
given to
prevent.

716 Where it appears to the court, from the examination and other testimony, if any, that there is reason to suspect that money or other property of the testator or intestate is withheld or concealed by the person cited, the court shall, unless the person cited gives security by a bond entered into with the petitioner as obligee, with such sureties and in such penalty as the court approves, for the payment of the money or delivery of the property, or in default of such delivery for the payment to the obligee of the full value thereof, and

in either case of all damages which may be awarded against the obligor for withholding the same whenever it shall be determined in an action brought by the obligee that it belongs to the estate of the testator or intestate, make a decree reciting the grounds thereof, and requiring the person cited to deliver possession of the money or other property, specifying the sum or describing the property, to the petitioner. But in the event of such security being given, and after payment within a time to be fixed therefor of any costs which the court may award to the petitioner, the proceedings shall be dismissed.

See section 2712 of the New York Code.

717 Where the decree requires the person cited to deliver money, disobedience thereto may be punished as contempt of court. Disobedience to decree, contempt.

Where it requires him to deliver possession of other property, a warrant shall issue on the application of the petitioner directed to the fiscal, and commanding him to search for and seize the property, if it is found in the possession of the person cited, or his agent, or any person deriving title from him since the presentation of the petition, to deliver the same to the petitioner, and to return the warrant within sixty days. Warrant to seize property.

The issue of such a warrant does not affect the power of the court to enforce the decree, or any part thereof, by punishing a disobedience thereto.

See section 2714 of the New York Code.

718 A creditor, or any person interested in the estate, may present to the court in the action in which grant of probate or administration issued, proof by affidavit that an executor or administrator has failed to file in court the inventory and valuation, and account (or a sufficient inventory and valuation, or sufficient accounts) required by law within the time prescribed Executor, &c., how compelled to return inventory and accounts.

therefor. Thereupon, or of its own motion, if the court is satisfied that the executor or administrator is in default, it shall make an order requiring the delinquent to file the inventory and valuation or accounts, or a further inventory and valuation or further accounts, as the case may be : or in default thereof to show cause at a time and place therein specified why he should not be attached. Upon the return of the order, if the delinquent has not filed a sufficient inventory and valuation or sufficient accounts, the court shall issue a warrant of attachment against him, and shall deal with him as for a contempt of court.

See section 2715 of the New York Code.

A creditor may make the application, and the court might, if necessary, proceed of its own motion [see *Throop's Ed. of the N. Y. Code*, p. 616].

How executor
or
administrator
may be
discharged
from
commitment.

719 A person committed to jail under the provisions of the last preceding section may be discharged by the court upon his paying and delivering under oath all the money and other property of the testator or intestate, and all papers relating to the estate under his control, to the judge, or a person authorised by the judge to receive the same.

See section 2716 of the New York Code.

Petition by
creditor or
legatee to
compel
payment.

720 In either of the following cases a petition, entitled as of the action in which grant of probate or administration issued, may be presented to the court which issued the same, praying for a decree directing an executor or administrator to pay the petitioner's claim, and that he be cited to show cause why such decree should not be made :

- (a) By a creditor, for the payment of a debt, or of its just proportional part, at any time after twelve months have expired since grant of probate or administration ;

(b) By a person entitled to a legacy, or any other pecuniary provision under a will or a distributive share, for the payment or satisfaction thereof, or of its just proportional part, at any time after twelve months have expired since such grant.

See section 2717 of the New York Code.

Where an executor had filed what purported to be a final account and the same was accepted by the court, *held*, that it was still open to an heir who had not got his distributive share of the estate to move under this section instead of instituting a separate administration suit [*In the Matter of the Last Will of A. Babun*, 1 C. L. R. 41].

This section is not to be taken as deferring the right of creditors of a deceased person to sue the executor or administrator until the expiration of a year from the grant of probate or letters of administration [*Perera v. Fernando*, 2 S. C. R. 54; 3 C. L. R. 9].

721 On the presentation of such petition the court shall issue a citation accordingly, and upon the return thereof shall make such decree in the premises as justice requires. But in any case where the executor or administrator files an affidavit setting forth facts which show that it is doubtful whether the petitioner's claim is valid and legal, and denying its validity or legality absolutely, or upon information and belief, or where the court is not satisfied that there is money or other movable property of the estate applicable to the payment or satisfaction of the petitioner's claim, and which may be so applied without injuriously affecting the rights of others entitled to priority or equality of payment or satisfaction, the decree shall dismiss the petition, but such dismissal shall not prejudice the right of the petitioner to an action or accounting.

Citation to issue.

Hearing and decree.

See section 2718 of the New York Code.

The court cannot under this section compel payment of a disputed claim or try the question in dispute [*Throop*, p. 618].

722 Every order or decree made under the provisions of this chapter shall be subject to an appeal to the Supreme Court.

Appeal.

Chapter 55.

Of the Accounting and Settlement of the Estate.

The provisions of this chapter do not apply to the estates of persons who died before the Code came into operation [*In the Matter of the Estate of Andris Perera*, 1 S. C. R. 296 ; 2 C. L. R. 105].

For observations on the object and effect of the judicial settlement of an estate under this Chapter see *Perera v. Fernando* [2 S. C. R. 54].

Intermediate
accounting,
voluntary.

723 An executor or administrator may at any time voluntarily file in the court from which grant of probate or administration issued to him an intermediate account, and the vouchers in support of the same.

See section 2722 of the New York Code.

Intermediate
accounting
compulsory.

724 The court may in any case, at any time, and either upon the application of a creditor or party interested, or of its own motion, make an order requiring an executor or administrator to render an intermediate account.

See section 2723 of the New York Code.

Judicial
settlement
of account.

725 In any of the following cases, and either upon the application of a party mentioned in the next section or of its own motion, the court may from time to time compel a judicial settlement of the account of an executor or administrator—

- (a) Where one year has expired since grant to him of probate or administration ;
- (b) Where such grant has been revoked, or for any other reason his powers have ceased ;
- (c) Where he has sold or otherwise disposed of any immovable property of the testator, or devisable interest therein, or the rents, profits, or proceeds thereof, pursuant to a power in the will, where one year has elapsed since the grant of probate to him.

See section 2724 of the New York Code.

726 The application for a judicial settlement in the last section mentioned shall be by petition, entitled as of the action in which grant of probate or administration issued, and may be presented by a creditor, or by any person interested in the estate or fund, including a child born after the making of a will; or by any person in behalf of an infant so interested; or by a surety in the official bond of the person required to account, or the legal representative of such surety. Upon the presentation thereof, citation shall issue accordingly; but in a case specified in sub-section (a) of the last preceding section the court may, if the petition is presented within less than eighteen months after the issue of probate or administration, entertain or refuse to entertain it in its discretion.

Who may
apply for
accounting.

Citation.

See section 2726 of the New York Code.

An action for a legacy bars a subsequent proceeding under this section [*Throop*, p. 623].

“Any person interested in the estate or fund.”—One of several joint administrators who is also one of the next of kin of the deceased may petition for the judicial settlement of accounts by the other administrators as well as himself, but, where joint administrators have filed their final accounts, one of them cannot compel the others to exhibit their accounts over again without disclosing material *prima facie* probative of errors in those accounts. [*In re the Estate of Dharmagoonawardene*, 2 C. L. R. 105].

727 Upon the return of such citation, if the executor or administrator fails either to appear or to show good cause to the contrary, or to present, in a proper case, a petition as prescribed in section 729, an order shall be made directing him to account within such a time and in such a manner as the court prescribes, and to attend before the court from time to time for that purpose: And the executor or administrator shall be bound by such order without service thereof, and if he disobeys it the court may issue a warrant of attachment against him, and the grant of probate or administration

Order to
account.

Supplemental citation. issued to him may be revoked. If it appears that there is a surplus, distributable to creditors or persons interested, the court may at any time issue a supplemental citation, directed to such persons as must be cited upon the petition of an executor or administrator for a judicial settlement of his account, requiring them to attend the accounting.

See section 2727 of the New York Code.

Person cited may bring in other parties. Proceedings. **728** Upon the return of any citation issued under any of the foregoing sections of this chapter, the executor or administrator may, if one year has expired since grant of probate or administration issued to him, present a petition as in the next section prescribed. A citation issued upon such a petition need not be directed to the petitioner in the special proceeding pending against the executor or administrator; but the hearing of the special proceeding shall be adjourned until the return of the citation so issued, whereupon the two special proceedings shall be consolidated. Such consolidation shall not affect any power of the court which might be exercised in either special proceeding.

See section 2728 of the New York Code.

Executor, &c., may petition for judicial settlement of his account. **729** At any time after the expiration of one year since grant of probate or administration to an executor or administrator, he may present to the court which issued the same a petition, entitled as of the action in which such grant issued to him, praying that his account may be judicially settled, and that the creditors or persons claiming to be creditors, husband or wife, heirs, next of kin, and legatees (if any) of the testator or intestate, or, if any of those persons has died, his executor or administrator (if any), may be cited to attend the settlement. If one or more co-executors or co-administrators presents such a petition for a settlement of his separate account, it must pray that his

co-executors or co-administrators be also cited. And Citation.
upon the presentation of any such petition a citation
shall issue accordingly.

See section 2729 of the New York Code.

730 Upon the return of such citation the court must Hearing.
take the account and hear the allegations and proofs of
the parties respecting the same. Any party may contest
the account with respect to a matter affecting his interest
in the settlement and distribution of the estate; and
any party may contest an intermediate account rendered
under section 724 in case the same has not been consoli-
dated under section 728.

Section 2730 of the New York Code.

731 Any creditor or person interested in the estate, Creditor not
although not cited, is entitled to appear upon the hearing, cited may
and thus make himself a party to the special proceeding. appear.

Section 2731 of the New York Code.

732 Any executor or administrator whose grant Executor, &c.,
has been revoked or who is desirous of resigning his whose grant
office may, in the same action, present to the court a has been
petition praying that his account may be judicially revoked may
settled, and that his successor (if any) and the other petition.
persons specified in section 729 may be cited to attend
the settlement. The proceedings thereon shall be
regulated according to the provisions of the last three
sections.

Section 2732 of the New York Code.

733 To each account filed under this chapter shall Affidavit to be
be appended an affidavit of the accounting party, to the annexed to
effect that the account contains, according to the best of accounts.
his knowledge and belief, a full and true statement of
all his receipts and disbursements on account of the
estate of the testator or intestate, and of all money and
other property belonging to the estate which has come

to his hands, or which has been received by any other person by his order or authority for his use : and that he does not know of any error or omission in the account to the prejudice of any creditor of, or person interested in, the estate.

Section 2733 of the New York Code.

Vouchers to
be produced.

734 Upon every accounting by an executor or administrator, the accounting party must produce and file a voucher for every payment, except in one of the following cases :

- (1) He may be allowed, without a voucher, any proper item of expenditure, not exceeding twenty rupees, if it is supported by his own uncontradicted oath or affirmation, stating positively the fact of payment and specifying where and to whom the payment was made : provided that all the items so allowed against an estate, upon all the accountings of all the executors or administrators, shall not exceed two hundred rupees.
- (2) If he proves, by his own or another's sworn testimony, that he did not take a voucher when he made the payment, or that the voucher then taken by him has been lost or destroyed, he may be allowed any item of which he satisfactorily proves the payment by the testimony of the person to whom he made it, or, if that person is dead or cannot be found, by any competent evidence other than his own or his wife's oath or affirmation.

But no such item shall be allowed unless the court is satisfied that the charge is correct and just.

Section 2734 of the New York Code.

Accounting
party to be
examined.

735 The court may at any time make an order requiring the accounting party to make and file his

account, or to attend and be examined on oath or affirmation touching his receipts and disbursements, or touching any other matter relating to his administration, or any act done by him under colour of his grant or after the death of the testator or intestate, and before the issue of such grant, or touching any movable property of the testator or intestate owned or held by him at the time of his death.

Section 2735 of the New York Code.

For decisions of American Courts as to items allowable and not allowable see *Throop's Ed. of the N. Y. Code*, pp. 627 and 628.

736 Upon a judicial settlement of the account of an executor or administrator he may prove any debt owing to him by his testator or intestate, provided that a concise statement of such debt with an intimation of the petitioner's intention so to prove the same has been inserted in the petition. Where a contest arises between the accounting party and any of the other parties respecting any property alleged to belong to the estate, but to which the accounting party lays claim, or respecting a debt alleged to be due by the accounting party to the testator or intestate, or by the testator or intestate to the accounting party, the contest must be tried and determined in the same special proceeding and in the same manner as any issue arising on a civil trial.

Court to determine claims.

Section 2739 of the New York Code.

737 From the death of the testator or intestate until the first judicial settlement of an account by his executor or administrator, the running of the Ordinance relating to the prescription of actions against a debt due from the deceased to the accounting party, or any other cause of action in favour of the latter against the deceased, is suspended, unless the accounting party was appointed upon the revocation of a former grant to another person; in which case the running of the Ordinance is so suspended from the grant to him until

Prescription.

the first judicial settlement of his account. After the first judicial settlement of the account of an executor or administrator the Ordinance begins again to run against a debt due to him from the deceased, or any other cause of action in his favour against the deceased.

Section 2740 of the New York Code.

Court may
allow for
property lost,
&c.

738 Upon a judicial settlement of the account of an executor or administrator the court may allow the accounting party for property of the testator or intestate perished or lost without the fault of the accounting party.

Section 2741 of the New York Code.

Effect of
judicial
settlement.

739 A judicial settlement under this chapter, either by the decree of the district court or upon an appeal therefrom, is conclusive evidence against all parties who were duly cited or appeared, and all persons deriving title from any of them at any time, of the following facts, and no others :

- (1) That the items allowed to the accounting party for money paid to creditors, legatees, heirs, and next of kin, for necessary expenses, and for his services, are correct.
- (2) That the accounting party has been charged with all the interest for money received by him and embraced in the account, for which he was legally accountable.
- (3) That the money charged to the accounting party, as collected, is all that was collectible at the time of the settlement on the debts stated in the account.
- (4) That the allowances made to the accounting party for the decrease, and the charges against him for the increase, in the value of property were correctly made.

Section 2742 of the New York Code.

Nothing short of a judicial settlement or a formal discharge or removal from office of an administrator makes him *functus officio* [*Ekanayaka v. Appu*, 3 N. L. R. 350].

740 When an account is judicially settled under the provisions of this chapter, and any part of the estate remains and is ready to be distributed to the creditors, legatees, heirs, next of kin, husband, or wife of the testator or intestate, or their assigns, the decree must direct the payment and distribution thereof to the persons so entitled, according to their respective rights. If any person who is a necessary party for that purpose has not been cited, or has not appeared, a supplemental citation must be issued as prescribed in section 727. Where the validity of a debt, claim, or distributive share is not disputed, or has been established, the decree must determine to whom it is payable, the sum to be paid, and all other questions concerning the same. And such decree shall be conclusive with respect to the matters enumerated in this section upon each party to the special proceeding who was duly cited or appeared, and upon every person deriving title from such party.

Decree for
payment and
distribution.

Section 2743 of the New York Code.

The court has the power to determine the validity of gifts *mortis causa* by the deceased. For decisions as to various items chargeable and not chargeable in favour of or against the accountant see *Throop's Ed. of the N. Y. Code*, p. 632.

741 In either of the following cases the decree may direct the delivery of unsold property, movable or immovable, or the assignment of an uncollected demand, or any other movable property, to a party or parties entitled to payment or distribution in lieu of the money value of the property :

When specific
property may
be delivered.

- (1) Where all the parties interested, who have appeared, manifest their consent thereto by a writing filed in court.
- (2) Where it appears that a sale thereof, for the purpose of payment or distribution, would cause a loss to the parties entitled thereto. The

value must be ascertained, if the consent does not fix it, by an appraisement under oath made by one or more persons appointed by the court for the purpose.

See section 2744 of the New York Code.

When money
may be
retained.

742 Where an admitted debt of the testator or intestate is not yet due, and the creditor will not accept present payment with a rebate of interest, or where an action is pending between the executor or administrator and a person claiming to be a creditor of the deceased, the decree must direct that a sum sufficient to satisfy the claim, or the proportion to which it is entitled, together with the probable amount of the interest and costs, be retained in the hands of the accounting party, or paid into court for the purpose of being applied to the payment of the claim when it is due, recovered, or settled; and that so much thereof as is not needed for that purpose be afterwards distributed according to law.

Section 2745 of the New York Code.

Share of
lunatic or
minor.

743 Where a legacy or distributive share is payable to a lunatic or minor, the decree may, in the discretion of the court, direct it to be paid to the manager or curator, as the case may be, of the estate of such lunatic or minor; and where a sum of less than one hundred rupees is so payable to a minor, the decree may direct that the same be applied to the maintenance or education of the minor. And such manager or curator shall apply and account for any sum received by him under this chapter in manner in chapters XXXIX. and XL. respectively provided with regard to sums coming to his hands as such manager or curator.

Section 743 of the New York Code.

Appeal.

744 Every order or decree made under the provisions of this chapter shall be subject to an appeal to the Supreme Court.

Of Accounting in case of Lunatics and Minors.

Chapter 56.

745 A petition praying for the judicial settlement of the account of—

- (a) the manager of the estate of a lunatic ;
- (b) the guardian of the person of a lunatic ;
- (c) the curator of the estate of a minor ;
- (d) the guardian of the person of a minor ;
- (e) the next friend of a minor plaintiff ;
- (f) the guardian for the action of a minor defendant ;

Compulsory
judicial
settlement of
accounts in
cases of
lunatics and
minors.

and that such person may be cited to attend the settlement thereof, may in every case where any such person is required by law to file accounts be presented to the court having jurisdiction, in the manner in the last preceding chapter provided, by any of the following persons respectively, viz. :—

In cases falling under heads (a) and (b)—

By the lunatic after he has been found by adjudication to have ceased to be of unsound mind, or by any relative or friend of the lunatic, or by the executor or administrator of a deceased lunatic, or under (a) by the guardian of the person and under (b) by the manager of the estate of a lunatic, or by any public officer mentioned in section 556.

In cases falling under heads (c), (d), (e), and (f)—

By the minor after he has attained majority, or by the executor or administrator of a deceased minor, or under (c) by the guardian of the person, and under (d) by the curator of the estate of a minor.

And in any case by the successor of any such manager, curator, guardian, next friend, or guardian for the action. But in cases falling under heads (b), (d), (e), and (f) proof must be adduced to the satisfaction of the court that

the person so required to account has received money or property of the minor for which he is liable to account and has not accounted.

Voluntary
judicial
settlement of
accounts in
cases of
lunatics and
minors.

746 A petition praying for the judicial settlement of his account and a discharge from his duties and liabilities may be presented in like manner by any of the persons described under heads (a), (b), (c), (d), (e), and (f) of the last preceding section, in any case where a petition for a judicial settlement of his account may be presented by any other person as prescribed in the last section. The petition must pray that every person who might have so presented a petition may be cited to attend the settlement.

Procedure.

747 Upon the presentation of any petition as mentioned in the last two sections, the court shall issue a citation accordingly. Sections 724 to 740 both inclusive shall be taken to apply so far as is practicable, *mutatis mutandis*, to all proceedings under this chapter. And the accounting party must annex to every account produced and filed by him an affidavit verifying the account.

Appeal.

748 Every order or decree made under the provisions of this chapter shall be subject to an appeal to the Supreme Court.

Chapter 57.

General Clauses.

Requisites of
petitions
under
chapters
relating to
lunatics, &c.

749 Every petition by which an application is made to a district court for the exercise of its powers over or in respect of lunatics, minors, or trustees shall state expressly that the petitioner does not know of any person interested in the subject of the petition or in the person sought to be affected by the order prayed for in the petition, who is likely to entertain any objection thereto, other than those who are named as respondents in the petition.

750 But the court shall have power nevertheless to direct that the order *nisi* be served on any person or persons other than a respondent, whom it may consider entitled to have notice of the application. Citations.

751 All security bonds made under or in pursuance of the provisions of chapters XXXIX., XL., and XLI. shall, unless otherwise expressly or by implication directed, be expressed to be made with the secretary of the court for the time being. And in the case of bonds so made, upon each occurrence of a change of secretary the new secretary shall be deemed to take the place of, and to be substituted for, the secretary whom he succeeds, as party obligee to the contract on the bond, and shall become such party as fully and completely in all respects as if he were originally made such party on the occasion of the making of the bond. Security bonds.

752 The district court shall have the like power to make the person appointed manager of a lunatic's estate, or the person appointed curator of a minor's estate, give security for the due administration of the estate as it has in the case of administrators of deceased persons' estates. Security for due administration.

OF APPEALS.

PART 8.

Of Appeals and Revision.

Chapter 58.

753 The Supreme Court may call for and examine the record of any case, whether already tried or pending trial, in any court, for the purpose of satisfying itself as to the legality or propriety of any judgment or order passed therein, or as to the regularity of the proceedings of such court, and may upon revision of the case so brought before it pass any judgment or make any order which it might have made had the case been Powers of revision by Supreme Court.

brought before it in due course of appeal instead of by way of revision.

As a general rule the Supreme Court will not, except in very exceptional cases, review an order from which an appeal might have been, but has not been, taken [*Davidson v. Silva*, 2 S C. R. 10].

An order of a District Court, which is wrong *ex facie* may be quashed by the Supreme Court in the exercise of its revisionary power, even though no appeal lay against such order [*Ranesinghe v. Henry*, 1 N. L. R. 303].

The object at which the Supreme Court aims in exercising its power of revision is the due administration of justice ; and whether any particular person has complained against an order proposed to be revised, or is prejudiced by it, is not to be taken into account in the exercise of such power [*In re the Insolvency of Thornhill*, 2 N. L. R. 105].

The Supreme Court has the power of revising the proceedings of all inferior courts. This power is in no way limited by the provisions of section 132 of the Insolvency Ordinance [*ibid*].

The Supreme Court has power to review a judgment of its own passed in appeal when it appears that fresh evidence has been discovered since such judgment was pronounced [*Loku Banda v. Assen*, 2 N. L. R. 311].

Form of
appeal and
transmission
thereof.

754 Every appeal to the Supreme Court from any judgment, decree, or order of any original court shall be made in the form of a written petition to the Supreme Court in the name of the appellant, and shall be preferred to the Supreme Court as hereinafter provided.

The petition of appeal shall be presented to the court of first instance for this purpose by the party appellant or his proctor within a period of ten days, or where such court is a court of requests seven days, from the date when the decree or order appealed against was pronounced, exclusive of the day of that date itself and of the day when the petition is presented and of Sundays and public holidays, and the court to which the petition is so presented shall receive it and deal with it as

hereinafter provided. If those conditions are not fulfilled it shall refuse to receive it.

The five days within which an appeal from an order under "The Small Tenements Ordinance, 1882," must be lodged is to be reckoned as prescribed by this section [*Babapulle v. Domingo*, 2 C. L. R. 96].

The petition, in the case of an appeal from a judgment of a Court of Requests, must be presented to the court below within the period fixed by this section, whether the appeal be as of right or with leave as provided for by section 13 of "The Court of Requests Amendment Ordinance, 1895" [*Arnolis v. Lewishamy*, 2 N. L. R. 222].

755 All petitions of appeal shall be drawn and signed by some advocate or proctor, or else the same shall not be received. Provided always that any party desirous to appeal may within the time limited for presenting a petition of appeal, and upon his producing the proper stamp required for a petition of appeal, be allowed to state *vivâ voce* his wish to appeal together with the particular grounds of such appeal, and the same shall (so far as they are material) be concisely taken down in writing from the mouth of the party by the secretary or chief clerk of the court in the form of a petition of appeal, when it shall be signed by such party and attested by the secretary or chief clerk, and be received as the petition of appeal of such party without the signature of any advocate or proctor.

To be drawn
by advocate
or proctor.

A petition of appeal to the Supreme Court may be signed by a proctor of the District Court [*Gunsekere v. De Silva*, 1 S. C. R. 195].

"Drawn by"—These words do not mean that the original conception as well as manual draft of the petition should be that of an advocate or proctor. It is sufficient if the petition itself bears the proper signature of an advocate or proctor [*Assauw v. Pestonjee*, 1 S. C. R. 221 ; 2 C. L. R. 86].

The proctor who signs the petition must be the proctor on the record. Another proctor may not sign the petition on behalf of the proctor on the record. Where both an advocate and a proctor have signed, and the authentication of either is bad, the requirement of this section is satisfied if that of the other is good [*ibid*].

An order, on the application of a Joint Stock Company through a proctor appointed by a person professing to be the recognised agent and manager of the company, to the effect that the "recognised agent" could not appoint a proctor, and the appointment is therefore bad, is an appealable order, although the application was not finally disposed of; and when the application and the proxy are not taken off the file or revoked, the appeal may be filed by the proctor so appointed [*The Singer Manufacturing Co. v. The Sewing Machine Co.*, 2 C. L. R. 200; 2 S. C. R. 27].

For observations on the question as to whether in an appeal from the court of the Special Commissioner appointed under Ordinance No. 5 of 1877 a petition of appeal signed and filed by the party himself is regular, see *Smith v. Wijeratne* [1 C. L. R. 44].

A petition of appeal was signed by the appellants alone (who had appeared by proctor in the court below) and bore the following certificate under the hand of the secretary of the court:—"The appellants appear before me and state their wish to appeal in person, as their proctor is laid up ill at Colombo. They also submit the grounds of appeal in writing, being the draft of a petition of appeal settled by an advocate, which are embodied in the form of a petition of appeal and signed by the appellants before me"—*Held*, that this petition complied with the requirements of this section [*Wengadasalam v. Rawter*, 3 C. L. R. 39].

The delay occasioned by the refusal of one's proctor to sign his petition of appeal is no ground for leave to appeal notwithstanding lapse of time, inasmuch as a party to an action can lodge a petition of appeal in person in terms of section 755 of the Code [*Punchi Banda v. Appuhami*, 3 N. L. R. 96].

Security for
costs of
appeal.

756 When a petition of appeal has been received by the court of first instance under section 754, the petitioner shall forthwith give notice to the respondent that he will on a day to be specified in such notice, and within a period of twenty days, or where such court is a court of requests fourteen days, from the date when the decree or order appealed against was pronounced, computed as in the same section is directed for the periods of ten days and seven days therein respectively mentioned, tender security as hereinafter directed for the respondent's costs of appeal, and will deposit a sufficient sum of money to cover the expenses of

serving notice of the appeal on the respondent. And on such day the respondent shall be heard to show cause if any against such security being accepted. And in the event of such security being accepted and also the deposit made within such period, then the court shall immediately issue notice of the appeal together with a copy of the petition of appeal, to be furnished to the court for that purpose by the appellant, to the fiscal for service on the respondent who is named by the appellant in his petition of appeal, or on his proctor if he was represented by a proctor in the court of first instance, and shall forward to the Supreme Court the petition of appeal together with all the papers and proceedings of the case relevant to the decree or order appealed against; retaining, however, an office copy of the decree or order appealed against, for the purposes of execution if necessary. And such proceedings shall be accompanied by a certificate (form No. 128, schedule II.) from the secretary or clerk of the court, stating the dates of the institution and decision of the case, in whose favour it was decided, the respective days on which petition of appeal was filed and security given, and whether either the plaintiff sued or the defendant defended *in formâ pauperis*. But where an appeal is taken from the decision of a judge of the Supreme Court sitting alone as in section 40 of "The Courts Ordinance, 1889," provided, the registrar of such court shall, after doing all acts and things necessary to be done by such secretary or clerk as aforesaid preparatory to forwarding proceedings in appeal to the Supreme Court as in this section provided, proceed in manner in section 768 prescribed.

Notice of
appeal to be
served on
respondent
by fiscal.

Certificate of
secretary.

The fiscal's return to the process issued under this section shall immediately upon being received by the court of first instance be transmitted to the Supreme Court, but where the appeal is from the decision of a judge of the Supreme Court so sitting alone as in the

last-mentioned Ordinance provided, such return shall be made to and filed by the registrar with the proceedings in appeal.

And when a petition of appeal has been so received, but the petitioner has failed to give the security and to make the deposit as in this section provided, then the petition of appeal shall be held to have abated, and the further proceedings in this section prescribed shall not be necessary.

The question whether the provisions here as to giving security for the respondent's costs apply to insolvency proceedings was considered in *In re the Insolvency of M. L. Markar* [1 N. L. R. 196], and it was there held, overruling the decision in *In re the Insolvency of Phillipa* [9 S. C. C. 120 ; 1 C. L. R. 29], that they do not.

It is not sufficient, under this section, that the appellant should, within twenty days, give notice of his intention to tender security. He must do so forthwith on the filing of the appeal, and he must actually tender the security within the twenty days, and within sufficient time to enable the court to accept or reject it. He cannot perfect his security after the lapse of twenty days ; and if the security tendered turn out insufficient, or does not satisfy the requirements of this section, and the court reject it, the appellant cannot tender fresh security after twenty days, but the proceedings abate [*Kandappen v. Elliott*, 1 S. C. R. 37 ; 2 C. L. R. 17].

Notice of appeal under this section should be served by the Fiscal [*Senanayake v. Appu*, 2 S. C. R. 135].

Security under this section may be dispensed with with the consent of the respondent [*Jayasekera v. Jansz*, 2 C. L. R. 25].

The deposit to cover the expenses of serving notice of appeal on the respondent must be made within twenty days, and in the case of a Court of Requests, within fourteen days from the date of the decree or order appealed against, and such deposit is a condition precedent to the right of prosecuting an appeal [*Henderson v. Daniel*, 2 C. L. R. 123].

The power of the Supreme Court to admit and entertain a petition of appeal under this section extends to all cases in which a regular appeal has not reached the court under the provisions of sections 754 and 756, including cases in which (a petition of appeal having been filed in time) the appeal has abated owing to default in the subsequent steps [*Pieris v. Silva*, 3 C. L. R. 21].

A District Judge has no right to delay the forwarding of a case in due course to the Supreme Court after the appeal has

been perfected [*In re the Insolvency of Thornhill*, 1 N. L. R. 243]; and it would be an act of insubordination on the part of a proctor to apply to the judge not to do his duty in this respect [*In re the Insolvency of Thornhill*, 2 N. L. R. 105].

757 The security to be required from a party appellant shall be by bond (form No. 129, schedule II.) with one or more good and sufficient surety or sureties, or shall be by way of mortgage of immovable property or deposit and hypothecation by bond of a sum of money sufficient to cover the costs of the appeal and to no greater amount.

Security to be
by bond and
with surety.

758 The petition of appeal shall be distinctly written in the English language upon good and suitable paper, and shall contain the following particulars :

Language
and frame of
appeal.

- (a) The name of the court in which the case is pending ;
- (b) The names of the parties to the action ;
- (c) The names of the appellant and of the respondent ;
- (d) The address to the Supreme Court ;
- (e) A plain and concise statement of the grounds of objection to the judgment, decree, or order appealed against—such statement to be set forth in duly numbered paragraphs ;
- (f) A demand of the form of relief claimed.

The court in deciding any appeal shall not be confined to the grounds set forth by the appellant, but it shall not rest its decision on any ground not set forth by the appellant, unless the respondent has had sufficient opportunity of being heard on that ground.

Grounds of
decision in
appeal.

759 If the petition of appeal is not drawn up in the manner in the last preceding section prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended, within a time to be fixed by the court; or be amended then and there.

Where
petition
to be
rejected.

When the court rejects under this section any petition of appeal, it shall record the reasons of such rejection. And when any petition of appeal is amended under this section, the judge, or such officer as he shall appoint in that behalf, shall attest the amendment by his signature.

When one of several plaintiffs or defendants may appeal against whole decree.

760 Where there are more plaintiffs or more defendants than one in an action, and the decree appealed against proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal against the whole decree, and thereupon the Appellate Court may reverse or modify the decree in favour of all the plaintiffs or defendants, as the case may be.

Chapter 49.

Of the Execution of Decrees under Appeal.

Execution pending appeal may be stayed before expiration of appeal time by the court which passed the decree.

761 Execution of a decree shall not be stayed by reason only of an appeal having been preferred against the decree ; but, if any application be made for stay of execution of an appealable decree before the expiry of the time allowed for appealing therefrom, the court which passed the decree may for sufficient cause order the execution to be stayed :

Proviso.

Provided that no order shall be made under this section unless the court making it is satisfied—

- (a) That substantial loss may result to the party applying for stay of execution unless the order is made ;
- (b) That the application has been made without unreasonable delay ; and
- (c) That security is given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

See section 545 of the Indian Code.

When proceedings are ordered to be stayed on giving security, the judgment-debtor must be allowed a reasonable opportunity to show that the security offered is sufficient [*Bahorria v. Lal Jumahir*, 20 W. R. 52].

762 Every application to the court for stay of execution under the immediately preceding section must be made by petition, in which the judgment-creditor shall be named respondent.

Application how to be made.

763 In the case of an application being made by the judgment-creditor for execution of a decree which is appealed against, the judgment-debtor shall be made respondent.

Application for execution of decree pending appeal must be on notice to debtor; and execution will only be granted on security.

If, on any such application, an order is made for the execution of a decree against which an appeal is pending, the court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be given for the restitution of any property which may be taken in execution of the decree, or for the payment of the value of such property, and for the due performance of the decree or order of the Supreme Court.

And when an order has been passed for the sale of immovable property in execution of a decree for money, and an appeal is pending against such decree, the sale shall, on the application of the judgment-debtor, be stayed until the appeal is disposed of, on such terms as to giving security or otherwise as the court which passed the decree thinks fit.

See section 546 of the Indian Code.

When a decree is reversed the lower court is bound to restore the defendants to the property out of which they had been turned in execution, whether the appellate decree expressly directed it or not [*In the Matter of Rajkissen Singh*, B. L. R. (F. B.) 605; 6 W. R. Miss. 3; *Latikooer v. Sahodrakober*, 2 Cal. L. R. 75; *In the Matter of Gobind Coomer Chowdry*, B. L. R. (F. B.) 714]. A refund carries interest [*Wooma Soonduree v. Gooroo Pershad*, 15 W. R. 74].

764 No such security in appeal shall be required from the Crown or (when Government has undertaken the defence of the action) from any public officer sued in respect of an act alleged to be done by him in his official capacity.

Exception in favour of Government.

See section 547 of the Indian Code.

Chapter 50.

Of Appeal notwithstanding Lapse of Time.

Appeal
notwith-
standing
lapse of time.

765 It shall be competent to the Supreme Court to admit and entertain a petition of appeal from a decree of any original court, although the provisions of sections 754 and 756 have not been observed; provided that the Supreme Court is satisfied that the petitioner was prevented by causes not within his control from complying with those provisions; and provided also that it appears to the Supreme Court that the petitioner has a good ground of appeal, and that nothing has occurred since the date when the decree or order which is appealed from was passed to render it inequitable to the judgment-creditor that the decree or order appealed from should be disturbed.

Proviso.

Petition
therefor

766 In every such petition of appeal as is the subject of the last section the judgment-creditor shall be named respondent, and the petition shall be accompanied by a certified copy of the decree or order appealed from, and of the judgment on which it is based, as well as by such affidavits of facts and other materials as may constitute *primâ facie* evidence that the conditions precedent to the petition of appeal being entertained, which are prescribed in the last section, are fulfilled. Also, every such petition shall be presented immediately to the Supreme Court in its appellate jurisdiction, and in addition to the prayer for relief in respect to the subject of appeal it shall contain a prayer that the appeal may be admitted notwithstanding the lapse of time.

to be
presented
immediately
to the
Supreme
Court.

Order of
Supreme
Court
thereon.

767 On any such petition being forwarded to the Supreme Court, the question whether or not it ought to be admitted shall be a preliminary question to be determined forthwith on summary procedure, according to the provisions of alternative (b), section 377, and for this purpose the jurisdiction of the court may be exercised by a single judge thereof. If upon the

hearing of this question the Supreme Court is satisfied that the conditions prescribed in section 765 are fulfilled, it may order the petition of appeal to be admitted upon such conditions as to costs, security, or otherwise as to the court may seem just, and in the event of its doing so the registrar shall, where the court of first instance is the Supreme Court, proceed as in section 768 provided ; but where such court is a district court or court of requests, the Supreme Court shall issue a mandate to such court, directing it to forward to the Supreme Court the record of the proceedings of the action in which the decree or order appealed from was passed ; if however, on the contrary, the court is not satisfied that the said conditions are fulfilled, it shall dismiss the petition and make such order as to costs as may seem to the court just.

Hearing of the Appeal.

Chapter 61.

768 When the petition of appeal has been preferred to the Supreme Court in manner in section 756 prescribed, or in the event of the petition of appeal being presented immediately to the Supreme Court, when the order for its admission has been made, the registrar shall, unless the court otherwise orders, number the petition and enter it in the roll of causes for hearing, according to the standing orders of court for the time being relative to the course of business of the court ; and the matter of the appeal shall come on for hearing before the court in the order of its position on that roll, and according to the said standing orders without further notice to the parties concerned ; provided that a list of the appeals pending before the court in their order on the roll, or of a sufficient number of them, be daily kept suspended upon the doors of the court, and that no appeal shall come on for hearing until it has been in that list in the case of appeals from district courts for fourteen, or in the case of appeals from courts

Hearing of
appeal.

Proviso 1.

Proviso 2. of requests for seven days ; and provided also that the court may of its own motion or on the application of a party concerned, and with reasonable notice to the parties, accelerate or postpone the hearing of an appeal, upon any such terms as to the prosecution or the costs of the appeal, or otherwise, as it may think fit.

Right of
appellant to
be heard and
respondent, if
required.

769 When the appeal comes on for hearing, the appellant shall be heard in support of the appeal. The court shall then, if it does not at once dismiss the appeal or affirm the decree appealed from, hear the respondent against the appeal, and in such case the appellant shall be entitled to reply. If the appellant does not appear either by counsel or in person, and has not been allowed to appeal *in formâ pauperis*, the appeal may in the discretion of the court be dismissed. Provided that on sufficient cause shown it shall be lawful for the Supreme Court to reinstate, upon such terms as the court shall think fit, any appeal that has been dismissed for non-appearance.

When party
may obtain
re-hearing of
appeal.

See sections 555 and 558 of the Indian Code.

Power of
court to
adjourn
hearing.

770 If at the hearing of the appeal the respondent is not present and the court is not satisfied upon the affidavits returned by the fiscal, or other evidence, that the notice of appeal was duly served upon him or his proctor, as prescribed in section 756, or if it appears to the court at such hearing that any person who was a party to the action in the court against whose decree the appeal is made, but who has not been made a party to the appeal, is interested in the result of the appeal, the court may adjourn the hearing to a future day, to be fixed by the court, and direct that such person be made a respondent, and may issue the requisite notices of appeal to the fiscal for service.

See section 559 of the Indian Code.

771 When an appeal is heard *ex parte* in the absence of the respondent, and judgment is given against him, he may apply to the Appellate Court to re-hear the appeal; and if he satisfies the court that the notice of appeal was not duly served, or that he was prevented by sufficient cause from attending when the appeal was called on for hearing, the court may re-hear the appeal, on such terms as to costs or otherwise as the court thinks fit to impose upon him.

Right of respondent to object to decree.

Same as section 560 of the Indian Code.

772 Any respondent, though he may not have appealed against any part of the decree, may, upon the hearing, not only support the decree on any of the grounds decided against him in the court below, but take any objection to the decree which he could have taken by way of appeal, provided he has given to the appellant or his proctor seven days' notice in writing of such objection.

Rights of respondent at hearing.

Such objection shall be in the form prescribed under head (e) of section 758.

See section 561 of the Indian Code.

A respondent who, under this section, wishes to take objection to the decree must furnish to the Supreme Court before the day of hearing a statement of the grounds of objection, set forth in duly numbered paragraphs. It is not sufficient merely to serve on the appellant notice that certain specific objections will be taken [*Fernando v. Fernando*, 2 C. L. R. 181].

A defendant or respondent cannot be heard by way of cross-appeal against a co-defendant or co-respondent [*Tarucknath Roy v. Tubooroonissa*, 7 W. R. 39. But see *Timmayga v. Lakshmana*, I. L. R. 7 Mad. 215].

A respondent cannot insist on his objections being heard when the appeal is dismissed for default [*Buroda Kant v. Pearee Mohun*, 23 W. R. 57]; or if the appellant has withdrawn from the appeal before the hearing has begun [*Bhahudoor v. Bhugwan*, 2 Agra. (F. B.) 23; *Dhondi Jagannath v. The Collector of Salt Revenue*, I. L. R. 9 Bom. 28]; or generally when the appeal is dismissed without being decided on the merits [*Ramjiuran v. Chand*, I. L. R. 10 Alla. 587].

If once the hearing has commenced, the respondent can insist on having his objections heard and determined [*Dhondi Jagannath v. The Collector of Salt Revenue*, I. L. R. 9 Bom. 28], even though it should be ultimately decided that an appeal would not lie [*Kamat v. Kamat*, I. L. R. 8 Bom. 368].

Power of court to dismiss the appeal, affirm, vary, or set aside the decree, or direct new trial, &c.

773 Upon hearing the appeal it shall be competent to the Supreme Court to exercise any of the powers in that behalf conferred upon it by section 40 of "The Courts Ordinance, 1889," or to order a new or further trial on the ground of discovery of fresh evidence subsequent to the trial. *

Judgment of the court.

774 On the termination of the hearing of the appeal, the Supreme Court shall either at once or on some future day, which shall either then be appointed for the purpose, or of which notice shall subsequently be given to the parties or their counsel, pronounce judgment in open court; and if the bench hearing the appeal is composed of more than one judge, each judge may, if he desires it, pronounce a separate judgment.

The judgment, which shall be given or taken down in writing, and shall be signed and dated by the registrar, shall, unless the decree or order appealed from is simply affirmed, or the petition of appeal is dismissed; state—

- (a) The points for determination ;
- (b) The decision of the judge or judges thereon ;
- (c) The reasons which have led to the decision ;
- (d) The relief, if any, to which the appellant is entitled on the appeal in consequence of the decision.

When appeal may be re-heard.

775 When the bench hearing the appeal is composed of two judges, and the judges composing the bench do not agree as to the decree which should be passed by the court on the appeal, then the appeal shall be re-heard by the full court of three judges on a day specially appointed for the purpose, of which notice

shall be given to the parties or their counsel. And after such re-hearing any judge dissenting from the decree which the majority consider ought to be passed on appeal shall state in writing the decree which he thinks ought to be made, and shall state his reasons for the same. Provided that in the case of appeals from the decision of a judge of the Supreme Court sitting alone as in "The Courts Ordinance, 1889," provided, when the two judges hearing the appeal do not agree, the original judgment shall stand affirmed.

When all the judges, of which the bench hearing the appeal is composed, are unanimous in regard to the decree which ought to be passed, the judges shall pronounce the judgments in order of seniority, commencing with the judge who is senior in rank, but, if otherwise, they shall pronounce their judgments in the reverse order.

See section 575 of the Indian Code.

776 The decree of the Supreme Court shall be passed in accordance with the judgments of the judges of which the bench hearing the appeal is composed, if they are unanimous in regard to it, but, if otherwise, in accordance with the judgments of the majority of them. It shall bear date the day on which the judgment was pronounced, and shall contain the following particulars :—

Decree of the
Supreme
Court :

- (a) The heading "In the Supreme Court ;" how framed ;
- (b) The court number and title of the appeal ;
- (c) The names of the parties ;
- (d) The names of the appellants and of the respondents cited ;
- (e) The parties present and heard ;
- (f) A clear specification of the order made and relief granted or other determination of the appeal.

The decree shall also state by what parties, and in what proportions, the costs of the action are to be paid.

to be sealed ;
and returned
to court of
first instance.

The decree shall be sealed with the seal of the court.

As soon as the decree is sealed all the proceedings in the case sent up to the Supreme Court on appeal (together with the petition of appeal and order thereon, if any, a copy of the judgment or judgments pronounced on appeal, and the decree of the Supreme Court) shall be forthwith returned to the court of first instance ; which shall conform to and execute such decree in all particulars.

See section 574 of the Indian Code.

Execution of
the decree
passed in
appeal.

777 When a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this chapter desires to obtain execution of the same, he shall apply to the court which passed the decree against which the appeal was preferred ; and such court shall proceed to execute the decree passed in appeal, according to the rules hereinbefore prescribed for the execution of decrees in an action.

See section 583 of the Indian Code.

The court in making restitution is bound to restore the parties, so far as they can be restored, to the same position they were in at the time when the court by its erroneous action had displaced them from it [*Hurro Chunder v. Shoordhonnee*, 9 W. R. (F. B.) 402] ; and in a suit for possession of land restitution carries mesne profits and interest on them [*Mokoond Lal v. Mahomed Sami*, I. L. R. 14 Cal. 484], although the decision is silent on the point [*Balavantrav v. Sadrudin*, I. L. R. 13 Bom. 485]. The court should in short do everything and make every order fairly and properly consequential on the reversal of the original judgment, such as giving costs and interest on the refund [*Jaswant v. Dip*, I. L. R. 7 Alla. 432].

Chapter 62.

Of Pauper Appeals.

Pauper
appeals.

778 Any person entitled under this Ordinance or any other law to prefer an appeal, who is unable to pay for the stamps required for the petition of appeal, may, on an application for that purpose made to the Supreme

Court in accordance with the rules hereinbefore prescribed for applications for the admission of an appeal notwithstanding lapse of time, so far as the same are applicable, be allowed to appeal as a pauper; provided that the court shall reject the application unless upon a perusal thereof, and of the judgment and decree against which the appeal is made, it sees reason to think that the decree appealed from is erroneous or unjust; and provided further, that the question as to the pauperism of the applicant shall be inquired into and determined by the Supreme Court in the same manner as is prescribed for the case of an application in the court of first instance to be allowed to sue as a pauper; and provided lastly, that if the applicant was allowed to sue as a pauper in the court against whose decree the appeal is made, no further inquiry into his pauperism shall be necessary unless the Supreme Court sees special cause to direct such inquiry.

See section 592 of the Indian Code.

Appeals to the Queen in Council.

Chapter 63.

779 Subject to such rules as may from time to time be made by Her Majesty in Council regarding appeals from the courts of this colony, and to the provisions hereinafter and in "The Courts Ordinance, 1889," contained, it shall be lawful for any person or persons, being a party or parties to any civil suit or action pending in the Supreme Court, to appeal to Her Majesty in Council against any final judgment, decree, or sentence, or against any rule or order made in any such civil suit or action, and having the effect of a final or definitive judgment, decree, or sentence.

Appeal to
Queen in
Council
subject
to rules.

See section 595 of the Indian Code.

A judgment whereby the Supreme Court decided that the defendant in the case had infringed the plaintiff's patent, and remitted the case for the assessment of damages, was held not to be a final judgment in terms of this section [*Jackson v. Brown*, 1 S. C. R. 313; 2 C. L. R. 127].

The limitations as to finality and value in the above provisions apply as well to the original judgment of the Supreme Court as to that pronounced in review [*ibid*].

Appeal under this section *ipso facto* suspends a decree, and nothing can be done thereon unless otherwise provided by law ; but steps taken to bring a decree of the Supreme Court in review preparatory to an appeal to Her Majesty in Council, and even the judgment of the Collective Court in review do not constitute an actual appeal so as to stop the execution of the decree [*Cassim Lebbe v. Suraye Lebbe*, 3 C. L. R. 61].

Application
to be made
to Supreme
Court.

780 Whoever desires to appeal under this chapter to Her Majesty in Council must apply by petition to the Supreme Court to have the judgment, decree, sentence, rule, or order against which he is desirous so to appeal brought before the Supreme Court collectively by way of review; and shall also give security for the payment of all costs of such hearing in review which may be awarded to the respondent.

Such application must be made within two calendar months from the date of the judgment, decree, sentence, rule, or order complained of.

See section 598 of the Indian Code.

Petition for
leave to
appeal.

781 Every petition must state the grounds of appeal, and pray for a certificate, either that, as regards amount, or value, and nature, the case fulfils the requirements of section 42 of "The Courts Ordinance, 1889," or that it is otherwise a fit one for appeal to Her Majesty in Council.

Upon receipt of such petition the court shall direct notice to be served on the opposite party to show cause why the said certificate should not be granted.

The power of the court under this section in regard to issuing notice and hearing cause shown against the certificate may be exercised by a single judge sitting at Colombo.

See section 600 of the Indian Code.

782 If such certificate is refused, the petition shall be dismissed.

When certificate granted court to hold hearing in review.

If the certificate is granted, then the court shall fix a day for hearing the case in review before all the judges of the court collectively holding general sessions at Colombo; and seven days' notice of such day shall be given by the registrar to all parties.

The judgment, decree, order, or sentence of the Supreme Court after such hearing in review shall be pronounced, made, or passed, in accordance with the rules hereinbefore prescribed for the judgment and decree on appeal.

See section 601 of the Indian Code.

783 The person feeling aggrieved by such judgment, decree, order, or sentence in review shall, if he desires to appeal therefrom, apply by petition to the Supreme Court within fourteen days after the same shall have been pronounced, for leave to appeal therefrom to Her Majesty in Council, and with this petition he shall present his petition of appeal to Her Majesty in Council; and shall within three months from the date of such judgment, decree, order, or sentence—

When party aggrieved may appeal from judgment in review, and to whom.

(a) Give security for the prosecution of the appeal and for the payment of all such costs as may be awarded by Her Majesty in Council to the party respondent; and

(b) Deposit the amount required to defray the expense of translating, transcribing, indexing, and transmitting to Her Majesty in Council a correct copy of the whole record of the action; except

(1) Formal documents directed to be excluded by any order of Her Majesty in Council in force for the time being; . . .

(2) Papers which the parties agree to exclude;

- (3) Accounts or portions of accounts which the officer empowered by the court for that purpose considers unnecessary, and the parties have not specifically asked to be included ; and
- (4) Such other documents as the Supreme Court may direct to be excluded ;

and when the appellant prefers to print in Ceylon the copy of the record, except as aforesaid, he shall also, within such time as is in the first clause of this section mentioned, deposit the amount required to defray the expense of printing such copy.

Of the
security to be
given by
appellant.

The nature, amount, and sufficiency of the security to be given by the appellant under section 780 and this section shall be determined by the Supreme Court upon the motion of the appellant made by petition, of which notice shall be duly served on the respondents ; provided that such security shall in no case exceed the sum of three thousand rupees, and shall be given either by a surety or sureties or by a mortgage of immovable property situate and being within this colony, or by deposit and hypothecation by bond of a sum of money.

Proviso.

See section 601 of the Indian Code.

The sufficiency of the security is to be determined by the Supreme Court after notice to the respondent. The mere deposit of a sum of money with the registrar by way of such security is insufficient, unless it be received with the consent of the respondent [*Ismail Lebbe v. Mohamad* and *Jackson v. The Colombo Com. Co.*, 2 C. L. R. 124].

Order on
completion of
security.

784 When such security has been completed and deposit made within the time in the last preceding section limited, then, and not otherwise, the Supreme Court shall make an order allowing the appeal, and the appellant shall be at liberty to prefer and prosecute his appeal to Her Majesty in Council, in such manner and under such rules as are observed in appeals made to the Queen in Council from the plantations or colonies.

Provided, nevertheless, that any person feeling aggrieved by any order which may be made by, or by any proceedings of, the Supreme Court respecting the security to be taken upon any such appeal as aforesaid, shall be and is authorized by petition to Her Majesty in Council to apply for redress. Proviso.

See section 603 of the Indian Code.

785 At any time before allowing the appeal, the Supreme Court may upon cause shown revoke the acceptance of any such security, and make further directions thereon. Revocation of acceptance of security.

See section 604 of the Indian Code.

786 If at any time after the appeal is allowed, but before the transmission of the copy of the record to Her Majesty in Council, such security appears inadequate or further payment is required for any of the purposes mentioned in section 783, sub-section (b), the Supreme Court may order the appellant to furnish, within a time to be fixed by the court, other and sufficient security, or to make, within like time, the required payment. Power to order further security or payment.

See section 605 of the Indian Code.

787 If the appellant fails to comply with such order, the proceedings shall be stayed, and the appeal shall not proceed without an order in that behalf of Her Majesty in Council, and in the meantime execution of the decree appealed against shall not be stayed. Failure to comply with order.

See section 606 of the Indian Code.

788 In all cases of appeal allowed by the Supreme Court or by Her Majesty, such court shall, on the application of the party or parties appellant, certify and transmit to Her Majesty in her Privy Council a true and exact copy of all proceedings, evidence, judgments, decrees, and orders, save as hereinbefore excepted, had or made in such causes so appealed, so far as the same Court to transmit copy of proceedings.

have relation to the matter of appeal, such copies to be certified under the seal of the said court.

Refund of
balance of
deposit.

789 When the copy of the record has been transmitted to Her Majesty in Council, the appellant may obtain a refund of the balance, if any, of the amount deposited under section 783.

Chapter 64.

Enforcement of Judgments and Orders of Her Majesty in Council.

Judgment of
Privy Council
how enforced.

790 Whoever desires to enforce or to obtain execution of any order of Her Majesty in Council shall apply by petition, accompanied by a certified copy of the decree or order made in appeal and sought to be enforced or executed, to the Supreme Court.

Such court shall, when the court which made the first decree appealed from is the Supreme Court, enforce and execute such order in the manner and according to the rules applicable to the enforcement and execution of its original decrees; but when the court which made the first decree appealed from is a court other than the Supreme Court, shall transmit the order of Her Majesty to the court which made such decree, or to such other court as Her Majesty by her said order may direct, and shall (upon the application of either party) give such directions as may be required for the enforcement or execution of the same; and the court to which the said order is so transmitted shall enforce and execute it accordingly, in the manner and according to the rules applicable to the enforcement and execution of its original decrees.

See section 610 of the Indian Code.

Order
enforcing
Privy
Council order,
how far
appealable.

791 The orders made by the court which enforces or executes the order of Her Majesty in Council relating to such enforcement or execution, shall be appealable in the same manner and subject to the same rules as the orders of such court relating to the enforcement or execution of its own decrees.

OF SUMMARY PROCEDURE IN RESPECT OF CONTEMPTS PART 9.
OF COURT. Chapter 55.

792 In all courts the summary procedure to be followed for the exercise of the special jurisdiction to take cognizance of and to punish summarily offences of contempt of court, and offences declared by this Ordinance to be punishable as contempts of court, shall be that which is prescribed in the sections next immediately following. Summary procedure in case of contempt to be as follows:

793 The court shall issue a summons to the accused person in the form 132 in schedule II. hereto or to the like effect, which summons shall state shortly the nature of the alleged offence and the information or grounds upon which the summons is issued, and shall require the accused person to appear before the court on a day named in the summons to answer the charge. Summons to accused.

Where a party appears to the summons to answer the charge, and asks for time to adduce evidence, he is not precluded from subsequently pleading to the jurisdiction of the court [*See in the Matter of the Application of John Ferguson for a Writ of Prohibition against the D. J. of Colombo*, 1 N. L. R. 181].

794 It shall be competent to the court simultaneously with issuing such summons, or at any time after such summons has been issued, if it has reason to believe that the attendance of the accused person at the time appointed in the summons to answer the charge cannot otherwise be secured, to issue a warrant for his arrest in the form 133 in the second schedule hereto or to the like effect, which warrant shall recite the issuing of the summons, and the day appointed therein for the hearing of the charge, and shall command that the accused person after arrest be kept in custody until that day, and be then brought before the court to answer the charge in the summons; provided that the person arrested shall at any time after arrest be enlarged upon sufficient security, to an At time of issue of summons court may issue warrant of arrest. Proviso.

amount endorsed on the warrant by the court, either of the accused person's own bond or that of another person, for his appearance in court on the day named in the summons, being furnished to the officer in whose custody he is.

Judicial officer to record minute of facts observed by him.

795 When the information upon which the charge is based is furnished to the court, either wholly or in part, by the personal observation of the judge of the accused person's behaviour and language in his presence, the judge shall at the time record a minute of the facts so observed by him, which shall be admissible as evidence at the hearing of the charge, and in such case no such summons as in section 793 is mentioned shall be necessary, but the accused person may be forthwith committed to jail or admitted to bail as in the last preceding section provided, and all further steps shall be taken in manner herein provided, as though such summons or summons and warrant as aforesaid had been issued.

On day of hearing court may ask accused if he admits truth of charge.

796 On the day appointed by the court for the hearing of the charge, or on any subsequent day to which the hearing may have been adjourned in consequence of the previous non-attendance of the accused person, the court shall commence the hearing by asking the accused person whether or not he admits the truth of the charge; and if he does not admit the truth of the charge, the court shall proceed to take evidence (if any) which may be necessary in addition to the court minute under section 795 to establish the charge; and also to take the accused person's statement and any evidence which he may offer in answer to the charge.

Form of the conviction and sentence thereon.

797 If the accused person admits the charge or if, after taking the evidence on both sides and considering the court minute and hearing the accused person's explanation, the court finds the accused person guilty

of the charge, it shall make out a conviction in the form 134 in the second schedule hereto or to the like effect, which shall recite the materials on which the conviction is founded, and adjudicate upon the material facts of the accused person's behaviour and language with so much of the surrounding circumstances as caused these to constitute the offence of contempt of court. And the sentence passed by the court shall be recorded on this conviction. If the court finds the accused person not guilty of the charge laid, it shall dismiss the charge, and shall make and record an order to that effect.

Court may
dismiss
charge.

798 An appeal shall lie to the Supreme Court from every order, sentence, or conviction made by any court in the exercise of its special jurisdiction to take cognizance of, and to punish by way of summary procedure the offence of contempt of court, and of offences by this Ordinance made punishable as contempt of court; and the procedure on any such appeal shall follow the procedure laid down in the Criminal Procedure Code regulating appeals from orders made in the ordinary criminal jurisdiction of district and police courts.

Appeal to
Supreme
Court.

799 Every sentence of fine or imprisonment passed by a court in exercise of its special jurisdiction to take cognizance of, and to punish by way of summary procedure the offence of, contempt of court, and offences by this Ordinance made punishable as contempt of court, shall be carried into effect in the same manner and according to the same procedure as is provided in the Criminal Procedure Code for carrying into effect sentences of fine or imprisonment passed by any court in the exercise of its ordinary criminal jurisdiction.

Procedure for
carrying out
sentence of
court in case
of conviction
for contempt.

800 The following sentences of fine or imprisonment, as the case may be, may be imposed on conviction

Sentences to
be imposed

under this
chapter.

for contempt under this chapter by the following courts respectively, viz.:—

By the Supreme Court.—Imprisonment, either simple or rigorous, until the contempt is purged, or for such period as the court directs, and fine not exceeding five thousand rupees in addition thereto or in lieu thereof.

By a district court.—Fine not exceeding one thousand rupees, or imprisonment, either simple or rigorous, for a period not exceeding six months.

By a court of requests.—Fine not exceeding one hundred rupees, or imprisonment, either simple or rigorous, for a period not exceeding three months.

PART 10.

SPECIAL PROCEDURE FOR COURTS OF REQUESTS.

Chapter 66.

Courts of Requests.

General.

Rules for
courts of
requests.

801 The following special rules as to procedure in courts of requests shall be taken as limiting and controlling the general provisions hereinbefore contained, but so far only as any such provisions are either expressly or impliedly applicable to such courts. Such general provisions shall apply to courts of requests in all respects whenever they are not inconsistent with the special rules in this chapter contained; but where there is any such inconsistency the special rules herein contained shall apply.

In Courts of Requests all technicalities of law should be avoided, and it is the duty of judges, especially in these courts, not to throw technical difficulties in the way of administering justice, but to remove them out of the way upon proper terms as to costs and otherwise [*Read v. Samsudin*, 1 N. L. R. 292].

For observations by BONSER, C.J., against merely technical objections being given effect to by judges see *Wickramatilaka v. Marikar* [2 N. L. R. 9].

Pleadings.

802 The pleadings in courts of requests shall be Pleadings.
limited to the following :—

- (a) The plaint of the plaintiff ;
- (b) The answer and claim in reconvention (if any)
of the defendant ;
- (c) The plaintiff's reply to the defendant's claim
in reconvention.

But where there is no claim in reconvention there shall be no further pleadings beyond the answer.

803 The plaint, or statement by way of plaint, shall Plaint to be numbered.
bear the serial number of the court in the order in which, and the date of the day and year on which, it was filed, and shall state the names and residences of the parties.

804 The plaint must state in a plain and direct Plaint to state cause of action.
manner the facts constituting the cause of action.

805 The plaintiff may unite in the same plaint What causes of action may be joined.
two or more causes of action when they all arise—

- (1) Out of the same transaction or transactions connected with the same subject of action ; or
- (2) Out of contract express or implied.

But it must appear on the face of the plaint that all the causes of action so united are consistent with each other, that they entitle the plaintiff to the same kind of relief, and that they affect all the parties.

806 Upon such plaint or statement being filed as Summons to issue.
aforesaid the chief clerk shall, by a note thereon, appoint a day for the appearance of the defendant, and shall inform the plaintiff or his proctor or advocate thereof ; and shall also issue a summons for the appearance of the defendant, stating therein the names and residences of the parties, the substance of the claim,

and the number of the case. Every such summons shall be in the form No. 16 in the second schedule hereto.

Summons.

Of the transmission of the summons.

807 All summonses, orders, and other process issuing from any court of requests shall be signed by the chief clerk of the court, and shall be transmitted to any fiscal or deputy fiscal throughout the island for service or execution : Provided that where it shall be made to appear to the commissioner that service of any summons, order, or process (excepting writs of execution and of possession) may be more conveniently or speedily effected otherwise than by transmitting the same to a fiscal or deputy fiscal, it shall be lawful for the commissioner, by endorsement on any such summons, order, or process, to direct that the same may be served by any person named therein.

Of the service of summons.

808 Sections 59 to 71, both inclusive, and chapter XXIII. of this Ordinance shall apply to the service, return, and proof of service of summons of the courts of requests, so far as they are not inconsistent with the provision in the last preceding section contained.

Proceedings on Appearance.

The defendant to appear and admit or deny the claim.

809 At the place and on the day specified in the summons the defendant shall be called upon to admit or deny the plaintiff's claim :

If the defendant admits the claim.

(a) If the defendant shall admit the claim, the commissioner shall enter such admission on the record in the form 135 in schedule II. hereto, and shall require the defendant to sign the same, provided that it shall be lawful for a defendant, who cannot conveniently attend the court, to forward his admission to the chief clerk, signed by himself in the presence and under the attestation of a justice of the peace or notary public ; and upon the

entry or receipt of such admission the commissioner shall enter judgment for the plaintiff accordingly.

- (b) If the defendant shall deny the claim, he shall be called upon to plead to the same forthwith, or within such time as the court on cause shown may allow; and he shall either state his defence orally to the commissioner as in section 73 provided, who shall enter the substance thereof by way of answer on a separate sheet of paper in the record upon a proper stamp being supplied by the defendant, or he shall deliver to the chief clerk an answer in writing duly stamped, setting out his defence and any claim in reconvention which he may have against the plaintiff. Such answer shall be signed by the defendant, his proctor, or advocate, and shall be dated and forthwith filed of record by the chief clerk.

If the defendant denies the claim.

809 A The parties may at any stage of the proceedings be examined by the commissioner with the view of ascertaining the points at issue between them and of dispensing with any unnecessary evidence [section 5 of Ordinance No. 12 of 1895].

Examination of parties.

An answer under this section may be sent to the chief clerk by post [*Ratwatta v. Appuhami*, 3 N. L. R. 270].

810 The answer shall contain a specific denial of each material allegation of the plaint which the defendant does not admit, and any such allegation not so denied shall be taken to be admitted. It may also set forth in a plain and direct manner new matter constituting one or more defences or claims in reconvention.

Of the answer.

This section is repealed by Ordinance No. 12 of 1895.

Of the claim
in reconven-
tion.

811 If the defendant pleads a claim in reconvention with his answer, the plaintiff shall be called upon to admit or deny the same. If he denies the claim in reconvention, the plaintiff shall be required forthwith, or at such further time as the commissioner shall fix, to plead thereto, and the provisions of sub-section (b) of section 809 and of section 810 shall, so far as applicable, apply, *mutatis mutandis*, to the plaintiff's reply to the defendant's claim in reconvention. Provided, however, that in no case shall the plaintiff set out in his reply new matter amounting to a new cause of action, if he could have pleaded the same in his original plaint.

Of the reply
thereto.

The words, "and of section 810" are repealed by Ordinance No. 12 of 1895.

Of entering
admission.

812 If the plaintiff admits the claim in reconvention, the commissioner shall enter such admission of record, and shall require the plaintiff to sign the same.

Joinder of Issue.

Of the
joinder of
issue.

813 As soon as the answer, or the reply to the claim in reconvention, if any, has been filed, the chief clerk shall enter a joinder of issue between the parties on the record.

Where new matter is set up by way of defence either in the answer or in the reply to the claim in reconvention, every material allegation of facts shall be deemed to have been denied by the opposite party.

This section is repealed by Ordinance No. 12 of 1895.

Miscellaneous Provisions relating to Pleadings.

Account or
instrument
for payment
of money.

814 For the purpose of setting forth a cause of action or claim in reconvention founded upon an account or upon an instrument for the payment of money only, it is sufficient for the party to deliver the instrument, or a copy of the account, to the court, and to state that there is due to him thereupon from the

adverse party a specified sum which he claims to recover or set off.

815 A variance between an allegation in a pleading and the proof shall be disregarded as immaterial, unless such proof discloses a new cause of action, or the court is satisfied that the adverse party has been misled thereby to his prejudice.

Immaterial
variance to be
disregarded.

816 The court shall, upon application, allow a pleading to be amended at any time before trial, or during the trial, if substantial justice will be promoted thereby. Where a party amends his pleading after joinder of issue, and it is made to appear to the satisfaction of the court that an adjournment is necessary to the adverse party in consequence of the amendment, an adjournment shall be granted. The court may also in its discretion, as a condition of allowing an amendment, require the payment of costs to the adverse party.

Amendment
of pleadings.

817 Where the defendant in an action for breach of a contract neglects to interpose a claim in reconvention consisting of a cause of action in his favour for a like cause, which might have been allowed to him at the trial of the action, he and every person deriving title thereto through or from him are for ever thereafter precluded from maintaining an action to recover the same.

Consequence
of neglect to
plead claim in
reconvention.

818 The prohibition in the last section contained does not extend to the following cases :

The last
section
qualified.

- (a) Where the amount of the claim in reconvention is over one hundred rupees ;
- (b) Where the claim in reconvention consists of a judgment rendered before the commencement of the action in which it might have been interposed ;
- (c) Where the claim in reconvention is for unliquidated damages ;

- (d) Where the claim in reconvention consists of a claim upon which another action was pending at the time the action was commenced ;
- (e) Where judgment is taken against the defendant without personal service of the summons upon him, or an appearance by him.

For the words "one hundred rupees" the words "three hundred rupees" have been substituted by section 6 of Ordinance No. 12 of 1895.

Judgment
upon claim in
reconvention.

819 Where a claim in reconvention is established which equals the plaintiff's claim, the judgment must be in favour of the defendant ; where it is less than the plaintiff's claim, the plaintiff must have judgment for the residue only ; where it exceeds the plaintiff's claim, the defendant must have judgment for the excess, or so much thereof as is due from the plaintiff.

Fixing Day of Trial.

Fixing the
cause for
trial.

820 Immediately after the parties have furnished the chief clerk with their list of witnesses the chief clerk shall fix a day for the trial of the action, and apprise the parties or their proctors, or advocates, thereof, and shall enter a minute thereof on the record ; and all actions fixed for trial shall be entered in their proper order in the trial roll to be for that purpose kept by the chief clerk, and shall be taken up for trial in the order in which they are so entered. Provided, however, that it shall be competent for the commissioner, upon cause shown, to take up any action and try the same out of its turn.

The following section has been substituted for this section by section 7 of Ordinance No. 12 of 1895 :—

Fixing the
cause for
trial.

820 (1) Immediately after the defendant's oral defence has been recorded or his written answer received, as provided by sub-section (b) of section 809, or where there is a claim in reconvention immediately after the same has been pleaded to as provided by section 811, the commissioner shall fix a day for the trial of the action, and shall enter a minute thereof on the

record ; and all actions fixed for trial shall be entered in their proper order in the trial roll to be for that purpose kept by the chief clerk, and shall be taken up for trial in the order in which they are so entered. Provided, however, that it shall be competent for the commissioner, upon cause shown, to take up any action and try the same out of its turn.

(2) The parties shall, as soon as the day of trial is fixed, file a list of their witnesses and of the documents which they propose to read in evidence at the trial, and no witness shall be examined and no document shall be received in evidence at the trial, without the special leave of the commissioner, unless the name of such witness and the description of such document appears in such list.

List of
witnesses.

Adjournments.

821 Whenever the commissioner shall be satisfied by affidavit or otherwise that either party is not ready to proceed to trial by reason of the absence of any material witness (such witness not being kept away by collusion), or for other sufficient cause, it shall be lawful for the commissioner to adjourn the trial of the action to a time fixed by the commissioner, once or oftener, upon such terms as the circumstances of the case may render necessary.

Of adjourn-
ments at the
instance of
the parties.

Provided that no adjournment shall be allowed for a longer period than six weeks, except with the consent of both the parties ; but the mere consent of the parties or of their proctors or advocates shall not be deemed sufficient ground for granting an adjournment unless good cause for such adjournment to the satisfaction of the court be likewise shown.

822 Upon granting an application for adjournment the commissioner may in his discretion, or upon the application of either party, direct that any witness who is in attendance be then examined, and the testimony of a witness so examined shall be recorded, and may be read at the trial as the evidence of such witness.

The court
may, upon
adjournment,
order
examination
of witnesses.

Of Default of Appearance.

823 Where default in appearing or pleading is made by the parties plaintiff or defendant respectively

Of
proceedings
on default.

in an action in the court of requests, the provisions of chapter XII. of this Ordinance shall apply, so far as they are not inconsistent with the procedure in this chapter prescribed.

The following section has been substituted for this section by section 8 of Ordinance No. 12 of 1895 :—

Proceedings
on default of
appearance of
plaintiff.

(1) If upon the day specified in the summons or upon any day fixed for the hearing of the action the plaintiff shall not appear or sufficiently excuse his absence, the plaintiff's action may be dismissed. Provided that if the defendant when called upon under section 809 shall admit the claim of the plaintiff, the commissioner shall enter judgment for the plaintiff according to law.

On default of
appearance of
defendant.

(2) If upon the day specified in the summons or upon any day fixed for the hearing of the action the defendant shall not appear or sufficiently excuse his absence, the commissioner, upon due proof of service of the summons, notice, or order requiring such appearance, may enter judgment by default against the defendant. Provided, however, that in all cases wherein the title to, interest in, or right to the possession of land shall be in dispute, and in any other cases in which the commissioner shall deem it necessary or expedient to hear evidence in support of the plaintiff's claim, he shall order him to adduce such evidence on any day to be fixed for that purpose; and after hearing such evidence the commissioner shall give such judgment on the merits as justice shall require, and without reference to the default that has been committed.

Judgment by
default may
be opened up
in certain
cases.

(3) If the defendant shall within a reasonable time, after such judgment or order, by affidavit or otherwise, satisfy the commissioner that he was prevented from appearing in due time by accident, misfortune, or other unavoidable cause, or by not having received sufficient information of the proceedings, and that he did not absent himself for the purpose of avoiding service of the summons or notice, and that he has a good and valid defence on the merits of the case, then the commissioner may set aside such judgment or order and any proceedings had thereon, and may admit the defendant to proceed with his defence upon such terms and notice to the plaintiff as the commissioner may think fit.

If neither
party
appears
action to be
dismissed.

(4) If upon the day specified in the summons or upon any day fixed for the hearing of the action neither party appears when the case is called on, the commissioner shall enter judgment dismissing the plaintiff's action, but without costs.

(5) When an action has been dismissed under the provisions of sub-section 1 or sub-section 4 of this section, and the plaintiff has by affidavit or otherwise satisfied the commissioner that he was prevented from appearing by accident, misfortune, or other unavoidable cause, the commissioner may grant to the plaintiff permission to institute a fresh action upon payment into court of the amount (if any) due to the defendant as costs in the previous action.

Plaintiff may be granted permission to institute a fresh action.

(6) No appeal shall lie against any judgment entered under this section for default of appearance, anything in "The Courts Ordinance, 1889," or in this Code contained to the contrary notwithstanding.

No appeal from judgment by default.

(7) Sections 84 to 88, both inclusive, shall not apply to courts of requests.

Sections 84 to 88 not to apply to courts of requests.

Under the repealed section 823, when on the day appointed for the trial of a case in the court of requests the defendant was absent, the commissioner was bound to follow the procedure in chapter 12, and hear the case *ex parte* and pass a decree *nisi* under section 85 [*Banda v. Guneratne*, 1 S. C. R. 75].

The failure of a plaintiff to attend at a place where the defendant had elected to take the decisory oath does not render the plaintiff's claim liable to dismissal [*Banda v. Banda*, 1 Tamb. Rep. 35].

Interrogatories.

824 Sections 94 to 100, both inclusive, shall not apply to courts of requests.

Provision as to interrogatories not to apply.

Of the Attendance of Witnesses.

825 The process of courts of requests for compelling the attendance of witnesses shall be by summons, with or without a clause requiring the production of documents in their possession or control; and every such summons shall be as near as is material in the form 32 in the second schedule hereto.

The attendance of witnesses.

By section 9 of Ordinance No. 12 of 1895 the following section has been substituted for this section :—

The process of courts of requests for compelling the attendance of witnesses shall be by summons, with or without a clause requiring the production of documents in their possession or control; every such summons shall be substantially in the form given in schedule B hereto.

The attendance of witnesses.

The attendance
of witnesses
continued.

826 The provisions of chapter XVII. of this Ordinance shall apply to courts of requests.

The following section has been substituted for this section by section 10 of Ordinance No. 12 of 1895 :—

The attendance
of witnesses
continued.

The provisions of chapter XVII. of this Ordinance, exclusive of section 121, shall apply to courts of requests.

Of the Trial.

The trial.

827 On the day of trial the commissioner shall hear and determine the action according to law.

Record of the
proceedings.

828 A full and complete record shall be kept of the examination of the parties, the evidence of the witnesses, and of all other proceedings had in the action.

Of the trial.

829 The provisions of chapter XIX. of this Ordinance shall, so far as they are not inconsistent with the provisions in this chapter contained, apply to courts of requests.

The following section has been added by section 11 of Ordinance No. 12 of 1895 :—

Action by
summary
procedure on
liquid claims.

829 A (1) In any action where the claim is for a debt or liquidated demand in money arising upon a bill of exchange, promissory note, or cheque or instrument or contract in writing for a liquidated amount of money, or on a guarantee where the claim against the principal is in respect of such debt or liquidated demand, bill, note, or cheque, and the plaintiff desires to proceed by way of summary procedure, he may institute such action in manner provided in chapter LIII. of this Ordinance, and the provisions of that chapter, exclusive of section 710, shall, for the purposes of any such action, apply to courts of requests.

Saving clause.

(2) Except as provided in chapter LIII. of this Ordinance, the procedure in any such action shall be the same as the procedure in actions instituted under this chapter.

Extending
provisions of
sections 655
to 705.

(3) The provisions of section 655 in respect of the affidavit of the plaintiff required by sections 650 and 653 shall extend to affidavits required by section 705 in actions instituted under chapter LIII. of this Ordinance in district courts and courts of requests.

Of the Judgment.

830 Judgments in courts of requests cases shall be pronounced in open court, be reduced into writing on the record, and be signed by the commissioner; and the provisions of chapter XX. of this Ordinance shall, so far as they are not inconsistent with the provisions in this chapter contained, apply to courts of requests.

Judgments
and decrees.

831 The provisions of chapters LVIII., LIX., LX., LXI., and LXII., with reference to appeals and the stay of execution pending appeal, shall, so far as they are not inconsistent with the provisions of this chapter, apply to courts of requests.

Appeal and
stay of
execution
pending
appeal.

With regard to appeals from courts of requests section 13 of Ordinance No. 12 of 1895 provides as follows:—

(1) After the coming into operation of this Ordinance there shall be no appeal from any final judgment, or any order having the effect of a final judgment, pronounced by the commissioner of any court of requests in any action for debt, damage, or demand, except upon a matter of law or upon the admission or rejection of evidence, or with the leave of the commissioner, anything in section 80 of "The Courts Ordinance, 1889," notwithstanding.

Appeals.

(2) In the event of the commissioner refusing to grant leave to appeal, it shall be lawful for the party aggrieved thereby, within seven days from the date of such refusal, to file in the court of requests a written application by petition to the Supreme Court for leave to appeal. Such application shall be forthwith forwarded by the commissioner to the Supreme Court, together with all papers and proceedings of the case, and a record of his grounds and reasons for refusing to grant leave to appeal, and shall be disposed of *ex parte* by a judge of the Supreme Court. If upon hearing the application the judge shall allow the appeal, he shall issue an order to the commissioner to admit a petition of appeal, upon such conditions and within such time as to the judge shall seem meet.

(3) Such application shall be liable to the stamp duty payable or leviable in respect of petitions of appeal in courts of requests under the provisions of part II. of schedule B of "The Stamp Ordinance, 1890," but when an appeal is allowed upon such application no further stamp duty shall be payable or leviable in respect of such petition of appeal.

(4) The stamp duty paid on the application for leave to appeal shall, for the purposes of taxation of costs, be treated as though it had been affixed to the petition of appeal.

When in an action in the court of requests two issues are framed—one on the question of jurisdiction and the other on the merits—and the commissioner determines the question of jurisdiction in the plaintiff's favour and adjourns the case for the trial of the issue on the merits, the defendant should not appeal against the order as to jurisdiction, but should wait until final judgment and then appeal, if it be against him, not only on the merits, but also on the ruling as to jurisdiction [*Ibrahim v. Maricar*, 3 N. L. R. 166].

Executions.

Execution.

832 The provisions of chapter XXII. of this Ordinance shall apply to all executions from courts of requests, so far as they are not inconsistent with the provisions in this chapter contained.

By section 12 of Ordinance No. 12 of 1895 the following section has been substituted for this section :—

Executions.

832 (1) The provisions of chapter XXII. of this Ordinance shall apply to all executions from courts of requests, so far as they are not inconsistent with the provisions in this chapter contained.

Money realised in execution.

(2) Money which has been realised in execution of a decree shall be paid out to the decree-holder on his *ex parte* application, provided that no notice has been received by the court of any claim to such money by any other person or persons.

Taxation of Costs.

Taxation of costs.

833 Before any writ of execution shall be issued as aforesaid, the chief clerk shall, at the request of the party applying for the writ, forthwith tax the costs and expenses of the action as against the adverse party, and shall enter a note of such taxation and of the amount thereby allowed on the record of the case; and such costs and expenses shall in all cases be taxed and payable according to the rates specified in schedule III. hereto.

Section 14 of Ordinance No. 12 of 1895 provides as follows :—

For the "scale of costs and charges to be paid to proctors in the courts of requests as well between party and party as

between proctor and client," contained in schedule III. of "The Civil Procedure Code, 1889," shall be substituted the scale given in schedule C hereto.

See section 6 of Ordinance No. 10 of 1897 as to costs in partition suits.

Miscellaneous.

Chapter 67.

834 No judge, magistrate, or other judicial officer shall be liable to arrest under civil process while going to, presiding in, or returning from his court. And where any matter is pending before a court having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties thereto and their proctors and advocates shall be exempt from arrest under civil process while going to or attending such court for the purpose of such matter, and while returning from such court.

Privilege from arrest of judges, parties, proctors, and advocates.

835 When in a case pending before any court there appears to the court sufficient ground for sending for investigation to a police magistrate a charge of any such offence as is described in sections 190, 193, 196, 197, 202, 203, 204, 205, 206, 207, 452, 459, 462, 463, 464, or 466 of the Ceylon Penal Code, which may be made in the course of any other action or proceeding or with respect to any document offered in evidence in the case, the court may cause the person accused to be detained till the rising of the court, and may then or sooner send him in custody to the magistrate or take sufficient bail for his appearance before the magistrate. The court shall send to the magistrate the evidence and documents relevant to the charge, and may bind over any person to appear and give evidence before such magistrate.

Civil court may send cases for investigation to police courts, when.

The magistrate shall receive such charge and proceed with it according to law.

836 At any time after a warrant of arrest has been issued under this Ordinance the court may cancel it on the ground of the serious illness of the person against whom the warrant was issued.

Warrant of arrest may be cancelled on ground of illness of party.

Judgment-debtor under arrest may be released on ground of illness :

837 When a judgment-debtor has been arrested under this Ordinance, the court may release him, if in its opinion he is not in a fit state of health to undergo imprisonment.

When a judgment-debtor has been committed to jail, he may be released therefrom—

(a) By the Inspector-General of Prisons or by any two visitors of the jail, on the ground of his suffering from any infectious or contagious disease ; or

(b) By the committing court or any court having jurisdiction in the place at which such jail may be situate, on the ground of his suffering from any serious illness.

but may be re-arrested.

838 A judgment-debtor released under the last preceding section may be re-arrested, but the period of his imprisonment shall not in the aggregate exceed six months.

APPENDIX.

[See Chapter II., pp. 45 and 46 *supra*, and Preface.]

CROWN LANDS.

A District Court may, upon information received by it supported by affidavit charging any person with having, without probable claim or pretence of title, entered upon or taken possession of any land, which belongs to Her Majesty, her heirs or successors, issue its summons for the appearance before it of the party alleged to have so illegally entered upon or taken possession of such land, and of any other person whom it may be necessary or proper to examine as a witness, on the hearing of any such information. The court should, in the presence of the parties, or in case of wilful absence of any person against whom any such information has been laid, in his absence, proceed in a summary way to hear and determine such information. If at the hearing it is made to appear by the examination of the said person or other sufficient evidence to the satisfaction of the court that he has entered upon or taken possession of the land mentioned or referred to in the information without any probable claim or pretence of title, and that he has not cultivated, planted, or otherwise improved and held uninterrupted possession of the land for five years or upwards, the court is authorised and required to make an order directing the person charged to deliver up to Her Majesty, her heirs or successors, peaceable possession of the land, together with all crops growing thereon, and all buildings and other immovable property upon and affixed to the said land, and to pay the costs of the information. If the party against whom an order as aforesaid is made does not, within fourteen days after service thereof, deliver up possession of the land and premises pursuant to the order, or makes afterwards, or causes to be made, any further encroachments upon the said land or premises contrary to such order or in evasion thereof, then the court may adjudge him to pay a fine not exceeding five pounds, or to be imprisoned, with or without hard labour, for any time not exceeding fourteen days, and make a further order for the immediate delivery over of the possession of the land and premises to Her Majesty, her heirs or successors : and the court must thereupon cause possession thereof to be delivered to Her Majesty, her heirs or successors, accordingly [Ordinance No. 12 of 1840, sect. 1].

Proceeding
against
person taking
possession of
Crown land.

On an information under this section the burden of adducing *prima facie* evidence to show (1) that the defendant had entered or taken possession of any land belonging to Her Majesty without any probable claim or pretence of title and

Burden of
proof as to
possession and
cultivation.

Probable
claim or
pretence of
title."

(2) that the defendant had not cultivated, planted, or otherwise improved and held uninterrupted possession of such land for a period of five years and upwards, lies on the Crown [*The Queen v. Habebo Mahamado*, Ram. for 1843-1855, p. 129]. In this case, on the expression "probable claim or pretence of title" the Supreme Court made the following observations:—
 " 'Probable,' is that which has more of evidence for than against it; which is more likely to be true and substantial than false and unfounded; and a majority of the judges think that 'probable' appears in this sentence to be equally applicable to 'claim' as to 'pretence of title,' because the latter cannot be construed in its bad sense. It is a general rule that where the title to property comes in question, the exercise of a summary jurisdiction by a justice of peace is ousted—see Burns, Vol. I., p. 833, Title 'Conviction.' But it is also held that this rule ought not to be so extended as to enable an offender to arrest the summary jurisdiction by a mere fictitious pretence of title or an assertion of right, where the party's (own) showing or other manifest circumstances proved the claim to be groundless. The whole sentence ought, moreover, to be taken together and judged by its context, and then the words 'probable claim or pretence of title' will amount closely to 'colourable title.'

" In *Hunt v. Andrews*—3 Barn & C. 346—which was an action for a penalty, Chief Justice Abbott said: 'It has been held, however, in an action brought to recover a penalty, it is sufficient for the defendant to show that he was acting under the appointment of a person who has a reasonable ground of title to the manor, for that is what I understand by the words 'colourable title.' So, in a similar case, *Rushworth v. Craven*—*Maclell*—R. 422—Baron Graham said: 'But the court requires the party to show some colourable title, that is, as I understand it, some *prima facie* evidence affording a fair presumption of title in the person claiming it;' and in the first-mentioned case the court held that proof of a deed of purchase reciting prior deeds of conveyance which were not produced with it did not show a colourable title when viewed with evidence of title from the opposite party repudiating such colourable title, and having a tendency also to prove that the party claiming a right ought to have known and must have known that he had no title whatever."

Right of
person against
whom order
is made to
proceed in
ordinary
course of law.

A person against whom an order as above is made may, notwithstanding such order, proceed by the ordinary course of law to recover possession of the land, if he is able to establish a title thereto. He may also recover reasonable compensation for the damage sustained by reason of his having been compelled to deliver up possession. In the same way, in the case of the

dismissal of an information the party who preferred it may proceed according to the ordinary course of law, as if no such information had been preferred [Ordinance No. 12 of 1840, sect. 2].

In the case of the dismissal of an information the court may order payment by Government to the party charged of such sum as it may consider to be the amount of costs fairly incurred by such party by reason of such information [sect. 3].

Costs on
dismissal of
information.

The form of proceedings to be observed on lodging complaints in issuing summonses, in the examination of the party or parties, in the making orders, and generally for the complete carrying into execution the powers vested by the Ordinance in District Courts must follow the general rules of practice in operation in such courts [sect. 4].

Form of
proceedings.

Cinnamon lands which the Government have uninterruptedly possessed for a period of thirty years and upwards by peeling the cinnamon growing thereon are to be held and deemed to be the property of the Crown [sect. 5].

All forest, waste, unoccupied or uncultivated lands are presumed to be the property of the Crown until the contrary is proved. All chenas and other lands which can only be cultivated after intervals of several years, if the same be situate within the districts formerly comprised in the Kandyan Provinces—wherein no thombo registers had before the passing of the Ordinance been established—are deemed to belong to the Crown and not to be the property of any private person claiming the same against the Crown, except upon proof only by such person of a *sammas* or grant for the same, together with satisfactory evidence as to the limits and boundaries thereof, or of such customary taxes, dues, or services having been rendered within twenty years for the same as have been rendered within such period for similar lands being the property of private proprietors in the same districts. In all other districts in this Colony such chena and other lands which can only be cultivated after intervals of several years are deemed to be forest or waste lands within the meaning of section 6 of Ordinance No. 12 of 1840.

Presumption
as to forest,
waste,
unoccupied
or
uncultivated
lands.

The words in this section, “all chenas, &c., in the Kandyan Provinces shall be deemed to belong to the Crown and not to be the property of any private person claiming the same against the Crown,” refer only to suits in which the Crown is a party [*Mulkadoovame v. Rang Ettena*, Ram. for 1843–1855, p. 25]. In this case the Chief Justice [Oliphant] was of opinion that in all probability the words “and not to be the property of any private person claiming the same against the Crown” have crept into the Ordinance *per incuriam*.

In order to bring land within the above provision it is necessary to show that it is chena incapable of being cultivated

otherwise than after intervals of several years [*Queen's Advocate v. Appuhami*, 1 S. C. C. 26].

Chena land possessed and cultivated by plaintiff and his ancestors for a very long time as appurtenant to his ancestral paddy lands and as forming part of his ancestral property is not chena within the meaning of this provision [*Kirihami v. Fernando*, 2 S. C. C. 88].

Plaintiff claimed the whole of the crops of paddy and chillies grown on certain chena land and based his claim on an alleged sale to him by Government. Defendants had cultivated the chena and raised the crops in dispute, and the Crown had not taken possession before the alleged sale to plaintiff, or put the plaintiff in possession—*held*, that the crops were *fructus industriales*, and as such were presumably the property of the persons in possession of the land who had raised them, and the mere fact that the Crown had a title to the land as being chena did not of itself show that the owner had a right to sell and transfer to a purchaser the *fructus industriales* growing on the land [*Gumattilleke v. Wasanahami*, 3 S. C. C. 80].

Evidence that land is situated within the limits of an old Kandyan Gabadagama does not raise a conclusive presumption that the land is the absolute property of the Crown, for there may be *paraveni* lands as well as *maravena* lands within the limits of a Gabadagama [*Queen's Advocate v. Kirimenika*, 3 S. C. C. 18].

In an action of ejectment the plaintiff founded his title upon a grant from the Crown. The evidence showed that the land in question was at the date of the grant covered with low jungle, that there were cocoanut trees of considerable age standing on the northern margin of it, jak trees more or less in a group on another side, and also some old cinnamon bushes scattered over it—*held*, that no one of the four alternatives mentioned in the first passage of clause 6 of Ordinance No. 12 of 1840 was established, and that the presumption created by that clause in favour of the Crown did not arise. "Unoccupied" and "uncultivated" as used in this clause are equivalent to "which have not been occupied or cultivated within the limit of time to which 'ordinarily available evidence extends'" [*Meera Lobbe v. Fernando* 2 S. C. C. 139].

The statutory presumption under this section that all chenas and other lands which can only be cultivated after intervals of several years are forest or waste lands and therefore the property of the Crown, is a rebuttable presumption merely. Where, therefore, the plaintiff relied upon a Crown grant of land which was admittedly chena, and the defendants proved acts of possession and cultivation of the chena for a long period of years, *held*, that the defendants were entitled to judgment [*Lewis v. Kiriappu* 5 S. C. C. 194; *Wijesekere v. Seelawanka*, 2 S. C. R. 12].

The presumption of title thus created attaches to the land after it has passed from the Crown to a private individual [see *Wijesekere v. Seelawanka*, 2 S. C. R. 12].

Forest lands are presumed to belong to the Crown until the contrary is proved [*Lokoo Banda v. Adochia* Lor., Rep. Part II., 23].

In the absence of conclusive documentary proof, a title to land claimed by the Crown cannot be established by a private party without parol evidence of possession and occupation [C. R., Panadure, 14,635, Gren. Rep. for 1873, Part II., p. 1].

A judgment which operates as *res judicata* outweighs the presumption created by Ordinance No. 12 of 1840 in favour of the Crown [C. R., Colombo, 86,215, Gren. Rep. for 1873, Part II., p. 3].

The fact that the bed of an old Portuguese military trench formed part of a parcel of land was held to be strong proof that the parcel was Government property [C. R., Colombo, 86,788, Gren. Rep. for 1873, Part II., p. 9].

When the ownership and possession of the low land to which a chena is appurtenant continue in the same person, or those claiming through him, it shifts the burden of proof even to a person in actual possession to show that, by that actual possession, he has acquired a prescriptive title [*per* BURNSIDE, C.J., in *Appurula v. Dawson*, 3 S. C. R. 1]. Independently of Ordinance No. 12 of 1840 there is no presumption in favour of the Crown in the case of chenas when they have been regularly cultivated at the ordinary short intervals of not more than seven years, but a presumption in favour of the Crown does arise independently of the Ordinance, when the land, though formerly chena land, has been neglected, and has not been sown in the usual course; then it becomes a waste or uncultivated land—a wilderness—and it is presumed to be at the disposal of the Crown [*per* LAWRIE, J., in *Appurula v. Dawson*, 3 S. C. R. 1].

Chenas, unlike ordinary lands, are only cultivated at long intervals, and closely continuous acts of ownership cannot, in such cases, be expected, or rigidly insisted upon [*per* WITHERS, J., in *Appurula v. Dawson*, 3 S. C. R. 1].

The presumption under section 6 of the Ordinance is not limited to proceedings under the Ordinance [*Attorney-General v. Samarasinghe*, 1 Br. Rep. 220].

Any person in the possession of land may make application in writing to the Government Agent of the Province in which such land is situate for a certificate of the Crown having no claim to such land. The application should contain a full description of the property, together with a survey thereof made by or under the authority of the Surveyor-General, and also a declaration by

Certificate of
non-claim.

the applicant stating the nature of his right or the manner in which he acquired possession. If the Government Agent is, upon investigation, satisfied that the Crown has no claim to such land, he, with the consent of the Governor, grants a certificate to that effect to such applicant. A copy of such certificate is previously entered in a book kept in the office of the Government Agent for that purpose. Such certificate or any copy from such entry thereof attested by the Government Agent is to be received by any court as a good and valid title to such land against any right, title, or claim of the Crown thereto existing at the date of such certificate [Ordinance No 12 of 1840, sect. 7].

Grant to
person in
possession.

Whenever a person has, without any grant or title from Government, taken possession of and cultivated, planted, or otherwise improved any land belonging to Government, and has held uninterrupted possession thereof for not less than ten or more than thirty years, he is entitled to a grant from Government of such land on payment by him of half the improved value of the land, unless Government requires the same for public purposes or for the use of Her Majesty, her heirs and successors. In that case such person is liable to be ejected from the land only on being paid by Government the half of the improved value thereof, and the full value of any buildings that may have been erected thereon [Ordinance No 12 of 1840, sect. 8].

This section contemplates the right of the Crown to half value of the land at the time of actual payment, and not at the date at which the party in possession becomes entitled under clause 8 [D. C., Kandy, 42,211, Gren. Rep. for 1873, Part II., p. 27].

Encroach-
ment on road,
&c.

Every encroachment on any public road, street, or highway, by building or other erection, or by enclosure, planting, or otherwise must, on information thereof, be immediately abated and removed by judgment, order, or decree of the District Court thereon, and the party or parties offending found liable in damages besides the costs of suit [Ordinance No. 12 of 1840, sect. 10].

Information
by headmen
as to
encroach-
ments.

Every headman who wilfully or knowingly refuses or neglects to give every information within his knowledge or power immediately to the Government Agent of his Province or some Assistant Agent thereof of any encroachment made by any person upon any Crown land situated in the village or district of such headman is liable for every such offence to a fine not exceeding ten pounds [Ordinance No. 12 of 1840, sect. 11].

Crown
Grants.

As to Crown grants, it may be observed that in conveyances of land from the Crown the purchaser is not entitled to any covenant for title, and in the absence of express warranty he must

be taken to have purchased at his own risk [*Fernando v. Queen's Advocate*, Ram. for 1872, 1875, 1876, p. 57]. In this case the plaintiff had purchased an allotment of land at a Crown land sale held by the Government Agent of the Southern Province, and had obtained a grant which contained no express warranty of title. The plaintiff was evicted by a third party on a writ in an action by him against the plaintiff, of which the Crown had due notice. The Government Agent thereupon refunded to the plaintiff the purchase money, and the plaintiffs sued the Queen's Advocate to recover as damages the costs incurred by him in defending the action which resulted in eviction. The Queen's Advocate pleaded that the Government Agent was not bound to warrant and defend the title of purchasers of Crown lands. The Supreme Court thought that, although according to the general law as laid down by Voet and other Dutch Law authorities, an implied warranty existed on the part of the seller against the eviction of the purchaser, that was to be understood as between ordinary party and party, and when the purchaser did not expressly consent to take a defective title with all its faults; and on the authority of Sugden on Vendors, p. 755, and Burge Vol. II., p. 553, held that in conveyances from the Crown the purchaser was not entitled to any covenant for title, and he must accordingly be taken to have purchased at his own risk.

A condition in a Crown grant to the effect that if within three years the land granted was not brought into full and fair cultivation the grantee should make good the value of the one-tenth share of the produce that the Government would have received had the land been duly cultivated, and the grant should be utterly void and of non-effect, can only be enforced at the expiration of three years or within a reasonable time thereafter. A condition that if at any time the land appear to have been for one year neglected and uncultivated the grant should be utterly void and of no effect, does not become inoperative by lapse of time, but is enforceable at any time, continuing non-cultivation being a continuing cause of forfeiture.

In each of the above cases the procedure provided by the grant to ascertain the fact of non-cultivation should be strictly followed to entitle the Crown to a right of action against the grantee [*Perera v. Samerenayeke*, Ram. for 1872, 1875, and 1876, p. 58].

In the case of a grant with the above conditions the Crown has no power, under the Roman-Dutch Law, to resume possession of the land and deal with it as Crown land without having first obtained a decree in that behalf from a competent court of justice [*Abeysekere v. Seneviratne*, 7 S. C. C. 171].

In a grant containing the expression "bringing into cultivation" chena cultivation is not the kind of cultivation and

improvement contemplated [D. C., Kalutara, 20,650, Gren. Rep. for 1873, Part III., p. 142].

Where a defendant had adduced proof of long cultivation and payment to Government of the tax of one-tenth and produced old deeds in his favour, the Supreme Court held that he had sufficiently shown such *prima facie* title as amounted to "a probable claim or pretence of title" under the Ordinance, and that the District Court should not have made order that the defendant should deliver up possession of the lands mentioned in the information [*Buller, Q. A., v. Sadris Mendis*, Ram. for 1843-55, p. 134].

STAMPS.

The stamp duties are a perpetual branch of the Royal Revenue. They are a tax upon all legal proceedings and certain private instruments. These imposts are very various according to the nature of the thing stamped. "The tax by way of stamp duties, says Blackstone, "is one which though in some instances it may be "heavily felt by greatly increasing the expense of all mercantile, "as well as legal proceedings, yet, if moderately imposed, is of "service to the public in general by authenticating instruments, "and rendering it difficult to forge deeds of any standing [I. Bl. "323]." The first institution of stamp duties in England was by statute 5 and 6 W. & M., c. 21, and they have since in many instances been very considerably increased.

The earliest Proclamation in Ceylon referring to stamps on pleadings and other documents in civil suits is that of the 13th August, 1802. By it all stamps required for pleadings and other proceedings in civil suits before any court of original jurisdiction, or for the copies of such pleadings or other proceedings, or for acts, extracts, or copies of any kind made or granted in the course of any civil suit were, until further orders, declared wholly remitted and excused.

The reason, whatever it was, for such remission having ceased, this Proclamation was annulled by a Proclamation of the 13th November, 1802.

Then by Regulation No. 1 of 1806 the use of detached stamps on transfers of property was prohibited, and provision made for the issue of stamped olas, paper, and parchment on which deeds and instruments requiring a stamp were to be written, and licensed sub-distributors of olas and stamps were appointed to the different subdivisions of districts to act under certain rules forming part of this Regulation.

By Regulation No. 1 of 1809 all deeds and other instruments relating to the transfer of movable or immovable property which had been stamped since the execution thereof were declared valid, and provision was made permitting the stamping, within a certain

time, of such documents as had remained unstamped. By Regulation No. 1 of 1811 the period limited by this Regulation was extended as regards the District of Mannar.

By Regulation No. 2 of 1817 the Regulations No. 1 of 1806 and No. 1 of 1809 were repealed, and other provisions made for the stamping of conveyances and other documents.

By Regulation No. 1 of 1820 the Regulation No. 2 of 1817 was amended, and provision made for simplifying the collection of stamp duties. Regulation No. 18 of 1820 amended Regulation No. 1 of 1820 and simplified further the collection of stamp duties. Regulation No. 11 of 1821 declared illegal the annexation [in order to make up the stamp duty payable] of stamps to deeds and instruments which the law required to be written on stamped paper of certain amounts, and Regulation No. 22 of 1822 amended Regulation No. 1 of 1820 and further simplified the collection of stamp duties.

Regulation No. 7 of 1823 repealed Regulations No. 2 of 1817, No. 1 of 1820, No. 18 of 1820, No. 11 of 1821, and No. 22 of 1822, and consolidated all enactments imposing stamp duties on deeds and other instruments; and Regulation No. 2 of 1823 amended in some respects the tables annexed to Regulation No. 7 of 1823.

Regulation No. 1 of 1827 authorised the use of stamps expressed in the currency of Great Britain in all cases where stamps expressed in rix dollars, fanams, or pice were required to be used.

Regulation No. 4 of 1827 repealed Regulations Nos. 7 and 20 of 1823 and established new tables of stamp duties payable upon deeds and other instruments in British currency, and Regulation No. 2 of 1830 amended Regulation No. 4 of 1827 as regards the stamp duty thereby imposed on conveyances of immovable property.

Regulation No. 1 1831 (expired) relaxed the provisions for stamp duties in favour of transactions relating to the pearl fishery.

Ordinance No. 6 of 1836 repealed Regulations No. 4 of 1827 and No. 2 of 1830, and revised all stamp duties and made provision for the general use of stamps throughout the Colony. Ordinance No. 7 of 1841 made provision for the use of stamps in certain judicial proceedings; and both these Ordinances were repealed by Ordinance No. 2 of 1848, which imposed certain other stamp duties in lieu of those then existing; and this Ordinance, in its turn, was repealed by Ordinance No. 19 of 1852.

Ordinance No. 19 of 1852 was amended by Ordinances No. 1 of 1855 and No. 7 of 1860, and these three Ordinances were ultimately repealed by Ordinance No. 11 of 1861. This Ordinance was amended by Ordinances No. 9 of 1865 and 8 of 1868, and the three were repealed by Ordinance No. 23 of 1871.

Ordinance No. 23 of 1871 was amended by Ordinance No. 8 of 1880, and all local enactments providing for the levy of stamp duties were consolidated by Ordinance No. 43 of 1884. These three Ordinances and so much of any other Ordinances as was inconsistent with Ordinance No. 3 of 1890 were thereby repealed, and this Ordinance [No. 3 of 1890] is now the principal Ordinance on the subject of Stamp Duties in the Island. In respect of stamp duties in cases for partition under Ordinance No. 10 of 1863 it has been amended by Ordinance No. 10 of 1897.

CUSTOMS.

The Customs are the duties, toll, tribute, or tariff payable upon merchandise exported and imported. The considerations upon which this revenue, or the more ancient part of it, which arose only from exports, was invested in the king were said to be two : (1) Because he gave the subject leave to depart the kingdom and to carry his goods along with him ; (2) because the king was bound of common right to maintain and keep up the ports and havens, and to protect the merchants from pirates [Bl. I. 313].

The earliest Proclamation of importance in Ceylon relative to Customs duties is that of the 30th December, 1802. That Proclamation directed that all and singular the customs or impositions of Government by virtue of any Proclamation or Proclamations, Advertisement or Advertisements, Law, Usage, or Custom then in force upon the importation and exportation of any goods, wares, or merchandise should cease, and declared the duties to be levied from and after the 1st February, 1803. This Proclamation was repealed by Regulation No. 6 of 1820, which, in its turn, was repealed by Regulation No. 9 of 1825. This Regulation was repealed by Ordinance No. 5 of 1837, which was, in part, repealed by several subsequent enactments. The remainder of it was repealed by Ordinance No. 18 of 1852, and that by Ordinance No. 17 of 1869, which, as amended and added to by several subsequent Ordinances, is now the principal Ordinance on Customs Duties. The amending Ordinances are 14 of 1871; 18 of 1877; 12 of 1879; 5, 14, and 39 of 1884; 8 of 1885; 16 of 1886; 14 of 1887; 11 of 1891; 5, 17, and 20 of 1892; 8 of 1894; 18 and 22 of 1896; and 7 of 1898.

PEARL FISHERY.

The only provisions now in force with regard to the Pearl Fishery are those of Regulation No. 3 of 1811 intended to prevent depredations being committed in the pearl banks by boats and other vessels frequenting those places in the calm season without any necessity or lawful cause for being in that situation.

POST OFFICE.

The earliest Regulation of importance establishing rates of postage for letters is No. 20 of 1813. The principal Ordinance now is Ordinance No. 13 of 1892 as amended by Ordinance No. 6 of 1894. Ordinance No. 14 of 1886 provides against the manufacture or issue of counterfeit British or foreign postage stamps in this Island.

SALT.

Regulation No. 16 of 1813 prohibited the manufacture of salt in any place or pan within the Districts of Chilaw, Putlam, and Calpentyn not named and appointed for the purpose by an advertisement published by the authority of Government. This Regulation was repealed by Regulation No. 2 of 1818, which made other provision for the protection from encroachment and fraud of the revenue derived by Government from salt, and further made provision for defining and publishing the limitations with respect to the manufacture, collection, sale, export, and import of salt. Ordinance No. 3 of 1836 repealed the Regulation of 1818, and consolidated and amended the laws for the protection of the revenue derived from salt. This Ordinance was amended by several subsequent enactments, and ultimately repealed by Ordinance No. 6 of 1890, which is now the principal Ordinance consolidating the laws relating to Her Majesty's revenue from salt.

TOLLS.

Regulation No. 17 of 1822 first made provision for the protection of the rights of the Crown to levy exclusive tolls on the passage of bridges and ferries in this Island. This Regulation was repealed by Ordinance No. 10 of 1842, which was repealed by Ordinance No. 9 of 1845. This Ordinance was repealed by Ordinance No. 22 of 1861, which in its turn was repealed by Ordinance No. 14 of 1867. This Ordinance was amended by Ordinances No. 9 of 1871, No. 7 of 1875, No. 6 of 1879, No. 2 of 1882, No. 12 of 1885, and No. 12 of 1887, and ultimately repealed by Ordinance No. 3 of 1896, which is now the principal Ordinance consolidating and amending the law with respect to the collection of tolls.

ARRACK.

The earliest regulation to restrict the sale of arrack and toddy appears to have been Regulation No. 8 of 1814. This was repealed by Ordinance No. 5 of 1834, which was repealed by Ordinance No. 10 of 1844, which, as amended by Ordinance No. 13 of 1891, is the principal Ordinance regulating the distillation and sale of arrack, rum, and toddy.

Ordinance No. 9 of 1892 imposes a duty on tavern licenses within Municipalities, and Ordinance 7 of 1898 imposes an export duty on arrack.

Ordinance No. 12 of 1891 consolidates and amends the Licensing Laws of the Island.

TREASURE TROVE.

Ordinance No. 17 of 1887, as amended by Ordinance No. 3 of 1891, contains the legislative provisions on the subject of **Treasure Trove**.

TIMBER.

Regulation No. 2 of 1822 made provision for the protection of the revenue of Government derived from "timber growing in the royal forests" and for imposing a tax on timber felled in private gardens. This Regulation was repealed by Regulation No. 1 of 1833, which made other provision in lieu thereof. Ordinance No. 24 of 1848 repealed the Regulation of 1833, and this Ordinance was repealed by Ordinance No. 6 of 1878, which was repealed by Ordinance No. 10 of 1885. This, as amended by Ordinance No. 1 of 1892, and Ordinances No. 1 of 1897 and No. 1 of 1899 are the principal Ordinances relating to forests and waste lands and to the felling and transport of timber.

RAILWAYS.

The first Ordinance on the subject of Railways was Ordinance No. 6 of 1864. This was repealed by Ordinance No. 10 of 1865, and now Ordinance No. 26 of 1885, which repeals Ordinance No. 10 of 1865, is the principal Ordinance on the above subject.

SHIP WRECKS.

Ordinance No. 5 of 1861 [as amended by Ordinances No. 4 of 1862, No. 4 of 1863, and No. 6 of 1884] and the English Acts 32 Vict. chap. 11 and 45 Vict. chap. 76 relate to Wrecks, Sea Casualties, and Salvage.

ADDENDA:

Containing chiefly summaries of the more important decisions of the Supreme Court on Civil Procedure since the preparation of this volume for the Press.

Page 8—The Law as to the duties and powers of Executors and Administrators.

Per BONSER, C.J., in *Fernando v. Fernando* [4 N. L. R. 201]—
 “By the Charter of 1833 the English Law of Executors and
 “Administrators was introduced into this Island, and in 1841
 “the Crown, by Ordinance No. 7 of that year, imposed a duty
 “on letters of administration and probates of wills
 “The Supreme Court in 1833 drew up Rules and Orders for
 “carrying into effect the provisions of the Charter as to the
 “testamentary jurisdiction of District Courts, and provided for
 “the cases of persons dying intestate where no next of kin
 “appeared to take out administration The law of exe-
 “cutors and administrators being new to the majority of the
 “people of this Island, the Supreme Court took upon itself
 “to direct the District Courts not to enforce the new law
 “too suddenly or inflexibly [Marshall’s Judg., p. 1]. The
 “District Courts would seem to have liberally construed this
 “intimation, and the practice grew up of not requiring letters
 “of administration in small estates and the practice
 “of not requiring administration in the cases of small estates
 “became so firmly established that it was recognised by the
 “Legislature in the year 1889, when the Civil Procedure Code
 “was passed. Before that date, the question what was a small
 “estate, and whether it was necessary to take out administration
 “or not in any particular case, was left to the discretion of
 “individual judges, but by the Civil Procedure Code that
 “discretion was taken away, and by section 547 it was laid down
 “that no estate which amounted to the sum of Rs. 1,000 was
 “ever to be considered a small estate, and that in every case
 “where the property amounted to Rs. 1,000 and upwards
 “administration ought to be taken out. It also enacted that no
 “action should be maintainable for the recovery of any property
 “included in the estate of any person where the estate amounted
 “to or exceeded Rs. 1,000, unless probate or administration
 “had been granted. The effect of that was to declare that the
 “executor or administrator was the only person who could sue in
 “respect of an estate amounting to Rs. 1,000 and upwards. But
 “even before the enactment of the Civil Procedure Code the
 “same rule prevailed, namely, that no action could be maintained

“except by the administrator or executor in the case of estates
 “which were not small estates. The only effect of section 547
 “was to determine what was a small estate.”

Page 18—Mohammedan Law.

Section 10 of Ordinance No. 5 of 1852 extends the Code of Mohammedan Laws drawn up in 1806 for the use of the Moors in the Western Province to all Mohammedans in the Island ; and where, in matters relating to Mohammedans, this Code is silent the Roman-Dutch Law applies. The limitation of the power of married women under the Roman-Dutch Law, however, does not apply to the case of married women among Mohammedans, as a marriage contracted according to their rites is not in substance the same as a monogamous marriage contemplated by the Roman-Dutch Law [*Tillekeratne v. Samsedeen*, 4 N. L. R. 65 ; 1 Br. Rep. 133].

Pages 47 and 49.—British Colonies, &c.

By Act 63 and 64 Victoria, ch. 12, entitled “The Commonwealth of Australia Constitution Act,” it was declared lawful for the Queen with the advice of the Privy Council to declare by Proclamation that the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty was satisfied that the people of Western Australia had agreed thereto, of Western Australia, be united in a Federal Commonwealth under the name of the Commonwealth of Australia ; and the Act made provision for a Federal Parliament to be called “The Parliament” or “The Parliament of the Commonwealth” to consist of the Queen, a Senate, and a House of Representatives, and as to the Executive Government, the Judicature, Finance, and Trade, and all other matters relating to the new constitution.

Page 153—Value of matters at issue to entitle parties to Appeal to the Privy Council.

Although the value of the matter at issue in a case sought to be brought in review before the Supreme Court collectively preparatory to an appeal to Her Majesty in Her Privy Council may be under Rs. 5,000, yet it is permissible for a party aggrieved to show that the matter involves indirectly the title to property exceeding the value of Rs. 5,000. The fact that the matter in which the application for leave to appeal was sought was one of three actions depending between the parties or their privies in estate for the recovery of a tenement in each case which, though separately assessed by the Local Board, formed nevertheless one property ; the fact that it was agreed between the parties

that the decision as regards title in one case should govern the other two cases; and the valuation set upon each of the tenements in order to show the aggregate value of the entire property may serve as evidence that the title involved indirectly exceeds Rs. 5,000 [*Cader Saibo v. Sayadu Beebi*, 4 N. L. R. 130; 1 Br. Rep. 170].

Page 176—Section 53 of "The Courts Ordinance."

Supreme Court Order No. 1 of 1900.

The following Rules have been embodied in an Order made by the Judges of the Supreme Court under section 53 of "The Courts' Ordinance, 1889," for regulating the mode of prosecuting civil appeals in the Supreme Court [see *Ceylon Government Gazette* of December 21, 1900] :—

1. (a) In every civil appeal preferred after the 31st day of July, 1900, the appellant shall furnish to the registrar, for the use of each of the judges who shall sit on the hearing of the appeal, a printed or typewritten copy of so much of the record of the case as may be necessary for the decision of the appeal.

(b) The costs of such copies shall be costs in the appeal, and shall be dealt with accordingly.

2. The Registrar of the Supreme Court shall, upon the application in writing of any party to the suit, supply him with typewritten copies (certified by him as office copies) of the whole or such part of the record as may be specified in such application, upon payment of fees not exceeding the scale in the schedule. Such payment shall be made by judicial stamps to be affixed to the application.

3. If the appellant shall not lodge with the registrar the copies of the record for the use of the court within one month from the date of the receipt of the petition of appeal in the Supreme Court Registry, or within such further time as the court or a judge shall in the circumstances consider reasonable, the court or a judge may order the appeal to be dismissed.

4. All petitions of appeal which are drawn and signed by an advocate or proctor shall be printed or typewritten, or written in good round clerks' hand, on machine-made creamlaid foolscap paper of fourteen pounds weight per mill ream or thereabouts.

5. This Order may be cited as "The Civil Appellate Rules, 1900," or as "Supreme Court Order No. 1 of 1900."

Schedule of Fees.

Final appeals from District Courts, including appeals in partition suits,—Rs. 4 for three copies.

Interlocutory appeals from District Courts,—Rs. 3 for three copies.

Appeals from Courts of Requests,—Rs. 2 for two copies.

[See 1 Br. Rep. 314.]

Page 187—Section 74 of "The Courts Ordinance."

The risk of losing costs is the only penalty incurred by a plaintiff who comes to the District Court when, considering the amount of his claim, he should have instituted his action in the Court of Requests. Hence, where a plaintiff brought an action under section 247 of the Civil Procedure Code in the District Court, although the amount of the writ under which the land had been seized was under Rs. 300—*held*, that an order dismissing the action was wrong [*Perera v. Perera*, 4 N. L. R. 282 ; 1 Br. Rep. 289].

The practice of parties overvaluing their claims in order to bring them within the jurisdiction of the District Court is one which should be discouraged, and District Judges, where they have suspicion of its being followed, should require evidence of the value of the land which is the subject of action, and enforce the provisions of section 74 of "The Courts Ordinance" [*Don Siman v. Johannis*, 4 N. L. R. 343].

Page 193—Injunctions.

An injunction granted by a competent court must be obeyed by the party whom it affects until it is discharged, and disobedience thereto is punishable as for a contempt of court, notwithstanding that it was irregularly issued [*Silva v. Appuhamy*, 4 N. L. R. 178].

Page 207—Section 12 of the Civil Procedure Code.

This section is intended to apply to a case of a mere trespasser, and not to a case where one co-owner excludes another from possession [*Arnolisa v. Diasan*, 4 N. L. R. 163].

Page 212—Section 17.

It is the duty of a defendant pleading non-joinder to state the name of the party to be joined, so that the plaintiff may have an opportunity of amending his plaint [*Ponnamma v. Kasipathipulle*, 4 N. L. R. 261 ; 1 Br. Rep. 273].

Page 219—Section 24.

There cannot be more than one proctor for a party at the same time on the record, and a proctor is not entitled to appear for a client unless he has a proxy signed by such client, nor can one proctor employ another proctor to appear for him and conduct a case. A proxy for such a purpose should not be received by the court. If the proctor appointed by a client does not wish to conduct the case himself he is at liberty to employ an advocate. The form of proxy [form No. 7] given under section 27 of the Civil Procedure Code, so far as it refers to one proctor appointing another proctor in a case, is not justified by

that section [*Letchemanan v. Christian*, 4 N. L. R. 323 ; 1, Br. Rep. 123]. It is the duty of a proctor to inform his client of the proper date of trial of his case and to ask for instructions to proceed with the trial. Where a proctor was remiss in his duty in this respect, and a decree *nisi* was entered against his client owing to his absence on the day of trial, *held*, that the omission of the proctor to do his duty was no ground to set aside the judgment [*Pakir v. Mohamado*, 4, N. L. R. 299 ; 1, Br. Rep. 280]. When, owing to the absence of a proctor in a case, another proctor appears for him without objection by the court or the losing party, the work done by the latter proctor should be accounted to the work of the former proctor and charged against the losing party [*Chittambalam v. Pootatambi*, 4 N. L. R. 346].

Page 253—Section 74.

The illness of the defendant is no excuse for his proctor not preparing or filing an answer in time. To justify the acceptance of an answer after its due date, it should be proved that the defendant was so ill that he could not attend to business or see his proctor. Where the explanation of the delay is unsatisfactory, it is competent for the court to place the defendant on terms, and in failure thereof to hear and dispose of the case *ex parte* [*Nutter v. Mohammado*, 4 N. L. R. 279].

Page 296—Section 160.

The requirement of this section that before a document purporting to be executed by an illiterate person who cannot read is put in evidence, it must be proved that at the time his name was written on or his mark put to it he understood its contents is merely directory, and may be waived by the parties to an action ; and where a person denies the fact that he put his mark to a document, and that fact is proved by the opposite party, it is not necessary to prove further that he understood the contents of the document as required by this section [*Tillekeratne v. Samsedeen*, 4 N. L. R. 65 ; 1 Br. Rep. 133].

Page 303—Section 184.

It is competent to the District Court, after both parties have closed the case, to call of its own motion a witness not cited by the parties and inform itself on relevant point that requires elucidation [*Kure v. Marikar*, 4 N. L. R. 148].

Page 305—Section 189.

Where a decree is entered of consent obtained by fraud, the proper remedy is to apply to the Supreme Court for an order on the court below to review the impugned decree and to confirm or rescind it. If upon review the decree is rescinded an *actio*

indebiti lies to the party who has been compelled to pay money in execution to recover it [*Gunaratna v. Dingiri Banda*, 4 N. L. R. 249].

Page 316—Section 209.

If a plaintiff exaggerates his claim and thereby causes unnecessary expense to the defendant, the defendant is entitled, whatever the result of the action may be, to be recouped these unnecessary costs [*Meera Saibo v. Omer Lebbe*, 4 N. L. R. 319].

Page 333—Section 324.

The expression "other persons" in this section is *ejusdem generis* with tenant, *i.e.* a person who has come on the land under the judgment-debtor by a title which had accrued before the decree [*Gunaratna v. Dingiri Banda*, 4 N. L. R. 249].

Page 385—Section 326.

An appeal from an order under this section must be regulated by the provisions of the Civil Procedure Code relating to appeals and not by the provisions of the Criminal Procedure Code [*Seneriratne v. Kurere*, 1 Br. Rep. 241].

Page 386—Section 327.

Before making order under this section that the petition of complaint be numbered and registered as a plaint, the court should find the facts which constituted the obstruction. If there was no obstruction, there is no foundation for the order [*Gunaratna v. Dingiri Banda*, 4 N. L. R. 249].

Page 405—Section 352.

This section has not the effect of repealing the Roman-Dutch Law as to the right of a special mortgagee of movables to preference in the proceeds of the sale of the mortgaged property [*Velliappa v. Pitche Maula*, 4 N. L. R. 311].

Page 423—Section 398.

In a hypothecary action, on the death of the defendant after action brought, the proper procedure to be adopted by the plaintiff is to have the legal representative substituted under this section, and not to obtain the appointment of a legal representative under section 642 [*De Silva v. Babasinno*, 4 N. L. R. 345].

Page 435—Section 433.

On an application under this section to examine a witness it must be clearly proved that the witness cannot be expected to attend, that the party making the application cannot reasonably be expected to bring him, and that he cannot be induced to come. Such evidence as letters alleged to have been written by a

witness to the effect that he is ill and cannot come is of little probative value. Medical evidence of such fact must be given. In applications of this kind the English practice should be followed [*Ahamado v. Habiboo*, 1 Br. Rep. 234].

Page 441—Section 438.

An affidavit sworn by a party to a case before his own proctor would not, according to the practice of English Courts, be admissible in evidence. Such practice should be followed here [*Pakir v. Mohamado*, 4 N. L. R. 299 ; 1 Br. Rep. 280.]

Page 470—Section 517.

An executor who produces in court the last will of a testator who had died many years since its production should be called on to explain his delay, and if it be found to be wilful he may properly be punished under this section. If a third of a century has not elapsed since the death of the testator, the will may be admitted to probate. In the case of a stale application for letters of administration, the court will not grant them unless necessity for administration is shown [*Re the Last Will of Hendricks*, 4 N. L. R. 24].

Page 473—Section 523.

The provisions in this section that "the claim of the widow or widower shall be preferred to all others" is not to be read with the qualification that the widow or widower is to be preferred only where another claimant who would make a better administrator cannot be found ; nor does the section mean that in every case they are to be sole administrators. If it is desirable in the interest of the estate, it is open to the District Court to associate some other person with the widow or widower as joint administrator [In the Matter of the Estate of Ukku Banda, 4 N. L. R. 257 ; 1 Br. Rep. 290].

Page 528—Section 669.

An order under this section disallowing a claim is no bar to the institution of an action by the claimant to establish his right to the property sequestered [*Karuppen v. Ussanar*, 4 N. L. R. 379].

Page 546—Section 691.

Where parties consent to refer their disputes to an arbitrator, they ought to be bound by the award, unless there are reasons which, according to the Civil Procedure Code, justify the award being remitted for correction or set aside altogether. When the time for making the award has expired, the court may enlarge the time on cause shown. Where an arbitrator, not having filed his award within the due date, applied in the presence of the parties

for further time to make his award, and no objection was made to such application, so that the arbitrator filed his award, and the case was allowed to stand over for the parties to show cause, if any, against the award, and the defendant's only objection to the award was that it was not filed within the period originally fixed by the court, *held*, that the defendant was estopped by his conduct from raising such an objection [*Ukku Naide v. Surendra*, 4 N. L. R. 118].

It is misconduct on the part of an arbitrator to proceed *ex parte* in the absence of an agreement to that effect. Even if this rule does not apply to a case of compulsory reference, it is misconduct on his part to hear fresh witnesses after informing the plaintiff that certain witnesses who had been already examined would be re-examined [*Amerasekere v. Silva*, 4 N. L. 276 ; 1, Br. Rep. 271.]

Page 553—Summary Procedure under Chapter 53.

A claim to unliquidated damages is a sufficient defence to an action under this chapter [*Whitham v. Pitche Muttu*, 4 N. L. R. 74].

Semble, per BONSER, C.J.—The procedure under this chapter does not apply to a case where the names of the defendants do not appear on the instrument sued on, and where the preliminary question to be tried is whether the instrument is binding on the defendants or not [*Meyappa v. Fernando*, 1 Br. Rep. 127].

Page 611—Section 831.

Leave to appeal should be given only when the court is satisfied that some gross mistake has been made by the Commissioner, and not because the balance of evidence appears to be in favour of the would-be appellant [*Babunhami v. Hendrick*, 1 Br. Rep. 143].

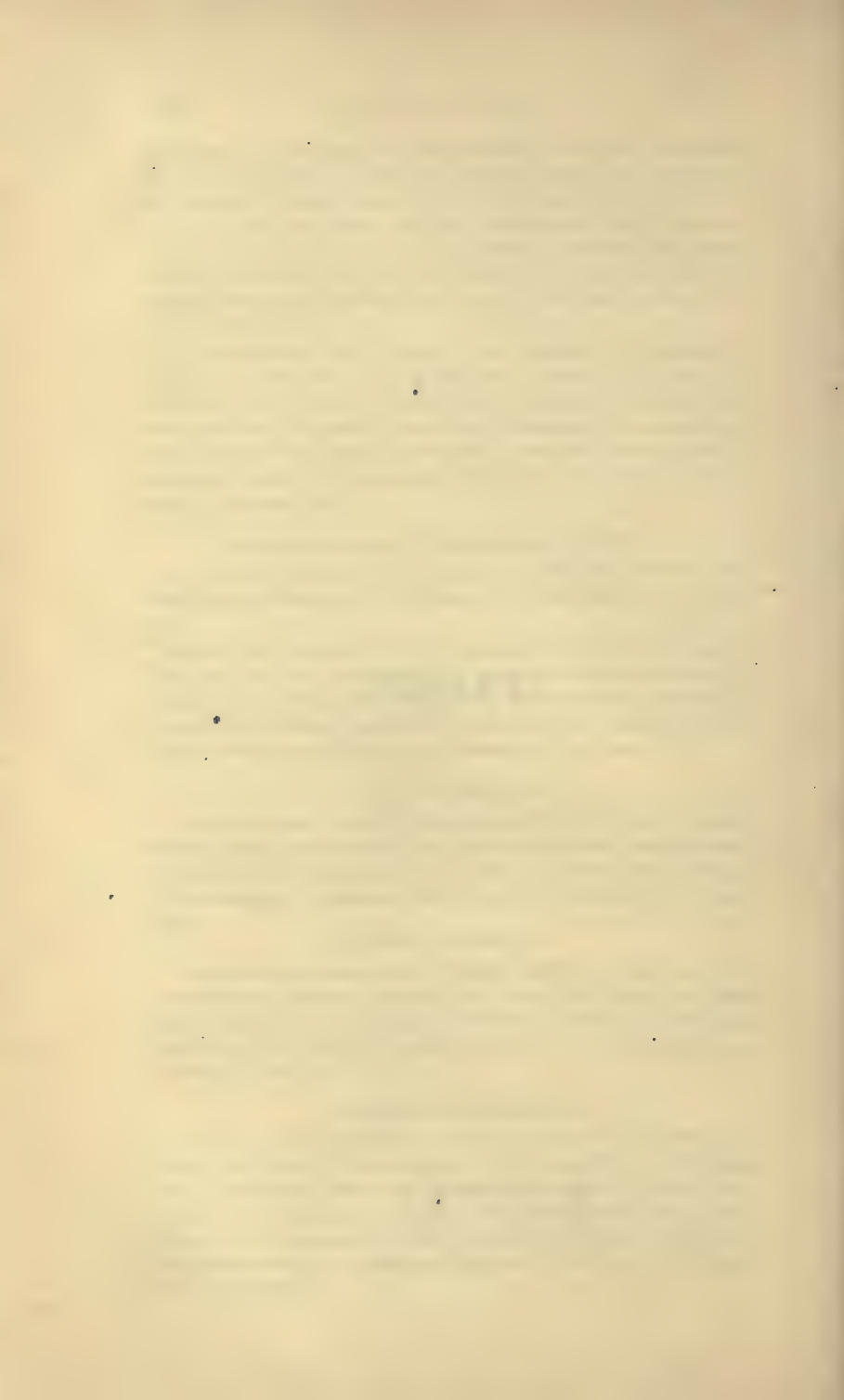
Page 613—Section 834.

The privilege from arrest under this section extends, until he has returned home, to an insolvent whose certificate has been refused, and who is returning home from a Police Court whither he had gone to answer a criminal charge [*In re the Insolvency of Pieris*, 1 Br. Rep. 1].

Page 620—Crown Grants.

Semble, per BONSER, C.J.—It is very inconvenient that we should go behind Crown grants. The rule of the Civil Law that a purchaser from the Government acquired by the grant a good title and was, in the words of the rescript of the Emperor Zeno, *statim securus*, was based on sound policy and tended to establish titles and to diminish litigation [*Don Siman v. Johannis*, 4 N. L. R. 343].

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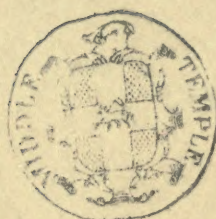
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